(12)

No. 95-1621-CFX Title: Harbor Tug and Barge Company, Petitioner
v.
John Papai, et ux.

Docketed: April 9, 1996 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 29 1996	Application (A95-719) to extend the time to file a petition for a writ of certiorari from March 11, 1996 to April 10, 1996, submitted to Justice O'Connor.
	Mar 1 1996	Application (A95-719) granted by Justice O'Connor extending the time to file until April 10, 1996.
	Apr 9 1996	Petition for writ of certiorari filed. (Response due July 29, 1996)
	May 7 1996	Waiver of right of respondents John and Joanna Papai to respond filed.
	May 8 1996	DISTRIBUTED. May 24, 1996
	May 21 1996	Response requested.
	Jun 3 1996	Order extending time to file response to petition until July 20, 1996.
	Jul 22 1996	Order extending time to file response to petition until July 29, 1996.
	Jul 26 1996	Motion of Industrial Indemnity Company for leave to file a brief as amicus curiae filed.
	Jul 29 1996	Brief of respondents John and Joanna Papai in opposition filed.
	Aug 7 1996	REDISTRIBUTED. September 30, 1996
	Sep 6 1996	LODGING consisting of three documents referred to in the reply brief submitted by counsel for the petitioner
	Oct 1 1996	Motion of Industrial Indemnity Company for leave to file a brief as amicus curiae GRANTED.
	Oct 1 1996	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. The brief of respondents is to be filed with the Clerk and served upon oppoosing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Friday, December 27, 1996. Rule 29.2 does not apply. SET FOR ARGUMENT January 13, 1997. **********
	Nov 8 1996	Motion of Shipbuilders Council of America, et al. for leave to file a brief as amici curiae filed.
	Nov 12 1996	Joint appendix filed.
	Nov 12 1996	Brief of petitioner Harbor Tug and Barge Company filed.
	Nov 12 1996	Brief amici curiae of Industrial Indemnity Company, et al. filed.
	Nov 25 1996	CIRCULATED.
	Dec 9 1996	Motion of Shipbuilders Council of America, et al. for leave to file a brief as amici curiae GRANTED.
	Dec 10 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for

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Entry	Date	Proceedings and Orders
		divided argument filed.
	Dec 10 1996	Brief amicus curiae of United Brotherhood of Carpenters and Joiners of America filed.
	Dec 10 1996	Brief of respondents John and Joanna Papai filed.
	Dec 10 1996	Brief amicus curiae of respondent United States filed.
	Dec 16 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 16 1996	Record filed.
	Dec 19 1996	Record filed.
	Dec 27 1996	Replv brief of petitioner Harbor Tug and Barge Company filed.
	Jan 13 1997	ARGUED.

(1) 95-1621

No.

In The

Supreme Court of the United States

October Term, 1995

HARBOR TUG AND BARGE COMPANY,

Petitioner,

vs.

JOHN PAPAI and JOANNA PAPAI,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Can an injured land-based maritime worker sue for seaman remedies after an Administrative Law Judge has formally determined that he was an LHWCA worker and not a seaman at the time of the injury?

II. Is a claimant's status as a seaman or not to be determined by his work history with his employer at the time of the injury, or by his entire work history?

PARTIES TO THE ACTION

Plaintiffs/Respondents:

John Papai and Joanna Papai.

Defendant/Petitioner:

Harbor Tug and Barge Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Harbor Tug and Barge Company discloses that it formerly was a California corporation, and that on August 1, 1992 it was merged into Crowley Marine Services, Inc., a Delaware corporation. Crowley Marine Services, Inc., which has no subsidiaries that are not wholly owned, is a wholly owned subsidiary of Crowley Maritime Corporation, a California corporation.

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The opinion of the United States Court of Appeals for the Ninth Circuit dated September 25, 1995, is reported at 67 F.3d 203 (9th Cir. 1995) and is reproduced in Appendix A to this Petition ("Pet. App."), pp. 1a-19a. The Ninth Circuit's unreported Order dated December 12, 1995, denying Harbor Tug and Barge Company's petition for rehearing or rehearing en banc is reproduced in Appendix B at Pet. App. pp. 20a-21a.

The following unreported rulings of the District Court are reproduced in the Appendices: Order Granting Partial Summary Judgment To Defendant Harbor Tug And Barge Company, May 29, 1990, Appendix C, Pet. App. pp. 22a-23a; Order Of Denial Of Reconsideration And Statement Of Grounds For Immediate Appeal, August 17, 1990, Appendix D, Pet. App. pp. 24a-25a; Order Confirming Summary Adjudication That Plaintiff Was Not A Seaman, April 6, 1992, Appendix E, Pet. App. pp. 26a-27a; and Judgment In Favor Of Defendant Harbor Tug And Barge Company, December 28, 1992, Appendix F, Pet. App. pp. 28a-29a.

The unreported Decision and Order of Administrative Law Judge Paul Mapes dated August 27, 1992, in Case No. 92-LHC-403, OWCP No. 13-85230, is reproduced in Appendix G at Pet. App. pp. 30a-57a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was issued on September 25, 1995. On October 6, 1995, Harbor Tug and Barge Company duly filed its Petition for Rehearing or Rehearing En Banc, which the Ninth Circuit denied by Order dated December 12, 1995. On March 1, 1996, Justice O'Connor approved an extension of time for filing a petition for

a writ of certiorari to and including April 10, 1996. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes involved in this case are: (i) 33 U.S.C. § 902(3)(G), part of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.* 33 U.S.C. § 902(3)(G) is reproduced in Appendix H at Pet. App. p. 58a; (ii) 46 U.S.C. § 688(a), the "Jones Act". The relevant portion of § 688(a) is reproduced in Appendix H at Pet. App. p. 58a.

STATEMENT OF THE CASE

A. Statement of Facts.

1. The Accident.

Respondent John Papai ("Papai") injured his knee while painting aboard the tug PT. BARROW (the "Tug"), which was docked at Alameda, California. The Tug was operated by Petitioner Harbor Tug and Barge Company ("HTB").[1]

Papai was not a permanent employee of HTB and was not permanently assigned to the Tug. He worked at various maritime related jobs for various companies. He obtained his maritime jobs through the Inland Boatman's Union ("IBU") hiring hall. The job he was performing on the day he was injured was a one day maintenance painting job.

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1. The factual record before the District Court when deciding the motions regarding seaman status is found in the following pleadings in the Clerk's Record (page references are to Papai's Excerpt of Record): CR10, pp. 38-85; CR11, pp. 87-91; CR15, pp. 111-116; and CR50, pp. 249-270. The Ninth Circuit's more succinct recitation of the facts is at Pet. App. pp. 2a-3a.

On the morning of March 13, 1989, Papai arrived at the HTB Dock in Alameda. Don Dawson of HTB, Papai's supervisor that day, told Papai and Edwin Low, a co-worker, to paint the "house" (the superstructure) on the Tug.

The Tug was tied to the dock. The Tug was unmanned; no operational crew members were aboard that day. Papai was not on ship's articles, and he did not take any orders from any Tug officers. The engines of the Tug did not run at all during the day while Papai was aboard.

Papai and Low went to the Tug and began painting. In the late morning, Dawson asked Low to shift over and work on another HTB tug across the dock. Low did so, and thereafter Papai worked alone.

At about 3:30 p.m. Papai was painting at the forward side of the house. He was using a portable ladder. He alleges that as he was climbing down the ladder, the ladder "moved", causing him to fall off and injure his knee.

2. Papai's Work History.

Papai entered the work force in 1968. Between 1968-1972 he worked as a mail clerk for the federal government. From 1972-1977 he owned and managed a bar. From 1979-1983 he worked as a bartender at various shoreside establishments. From about 1983-1986 he worked for a company that performed catering services for party and ferry boats. He worked aboard the boats but lived at home. The catering company that employed him did not own or operate the boats. His job was to help stock the boats with food, set up, serve the food, and clean up afterward.

Beginning in 1987 Papai began to obtain jobs out of the IBU hiring hall in San Francisco, California. From then until the date

of the accident Papai worked at various jobs for various employers. Most of the jobs were for one day, but some were for two or three days. The longest job he had was for 40 days working for the Golden Gate Transit District, chipping rust and painting on the dock at the San Francisco Ferry Terminal. Usually, however, once Papai finished a job for the day, he would go back to the IBU hiring hall the next day to put in for another job.

The jobs Papai had during the 1987 - March 1989 period consisted mostly of maintenance work, deckhand work, and longshoring work. Maintenance work consisted of chipping rust and painting. This was done while boats were tied to a dock. Deckhand work consisted mainly of manning the lines on boats during docking and undocking. That work was done on boats that were working. Longshoring work consisted of helping to load and discharge vessels that were docked. He also did some shoreside bartending during this period. During the 1987 - March 1989 period Papai lived, ate, and slept at home.

From January 1, 1989, until the date of the accident on March 13, 1989, Papai had worked for HTB from time to time, for a total of thirteen days. Papai last worked for HTB about nine days before the accident, when he worked on a different tug. Although Papai had worked on the Tug a few times before, each time that he had worked on the Tug he had performed maintenance work only. The Tug was always tied to the dock when Papai had worked on it.

The job Papai had on the day of the accident was a one-day job. Papai was not going to sail with the Tug; he was to go back to the IBU hiring hall the next day to see if he could get another job. He was paid hourly, including on the day he was injured.

B. Procedural History of the Case.

1. Papai's Civil Action.

In January 1990 Papai filed his Complaint against HTB in the U.S. District Court for the Northern District of California, seeking damages for personal injuries, and alleging causes of action for negligence under the Jones Act (46 U.S.C. § 688) and for unseaworthiness under the general maritime law. Papai could assert such causes of action only if he was a "seaman" at the time of his accident. In April 1990 HTB moved for summary judgment that at the time of the accident Papai was not a seaman. The District Court (Judge Charles A. Legge) granted HTB's Motion by Order dated May 29, 1990. (Appendix C.)

In May 1990 Papai filed a First Amended Complaint against HTB for damages for personal injuries, asserting a cause of action for negligence under § 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.*, and under general negligence principles.

In June 1990 Papai moved for reconsideration of the District Court's determination that he was not a seaman. By Order dated August 17, 1990, the Court denied the Motion and reaffirmed that Papai was not a seaman. (Appendix D.) Following two subsequent U.S. Supreme Court decisions concerning seaman status, the District Court asked for further briefing on the seaman status issue. On April 6, 1992, following that briefing, the District Court issued an order confirming that at the time of the accident Papai was not a seaman within the meaning of the Jones Act or the general maritime law. (Appendix E.)

Trial was to the District Court without a jury in August-September 1992. The District Court held that Papai had not established any negligence by HTB under either § 905(b) of the LHWCA or under general negligence principles. The District

Court therefore issued a Judgment in favor of HTB. (Appendix F.) Papai appealed to the Ninth Circuit.

2. Papai's LHWCA Compensation Action.

While Papai's civil action was pending, so too was his LHWCA compensation action. Soon after his injury, Papai had made a claim against HTB under the LHWCA for compensation and medical benefits. HTB paid Papai those benefits on an interim basis. However, Papai and HTB disputed several LHWCA compensation issues, including LHWCA coverage (Papai's status as an LHWCA worker or as a seaman). Members of the crew of a vessel (i.e., seamen) are not covered by the LHWCA and are not entitled to LHWCA benefits. 33 U.S.C. § 902(3)(G).

LHWCA compensation issues are determined by formal administrative trials before an Administrative Law Judge ("ALJ") of the U.S. Department of Labor. For an extensive period Papai's civil (Jones Act) litigation and his LHWCA compensation action proceeded simultaneously. On June 2, 1992, ALJ Paul Mapes held a formal trial in the LHWCA case. He received oral testimony, deposition testimony, exhibits, and briefing by the parties. On August 27, 1992, he issued his written Decision and Order. (Appendix D.)

In his decision the ALJ addressed in detail the issue of Papai's status as an LHWCA worker or as a seaman. In the LHWCA compensation action, Papai asserted that he was an LHWCA worker and not a seaman, and that he therefore was entitled to compensation under the LHWCA. HTB took the position in the LHWCA compensation action that if Papai was a seaman, as he was asserting in the civil action, then he was excluded from LHWCA coverage.

The ALJ held that the evidence showed that Papai was an LHWCA worker, not a seaman, and thus that Papai was entitled to LHWCA compensation benefits. (Pet. App. at pp. 34a-37a.) The ALJ made a formal award of benefits to Papai.

A decision by an ALJ in an LHWCA compensation case can be appealed to the Benefits Review Board, and then to the courts. The appeal must be filed within 30 days. 20 C.F.R. § 802.206 (1995). Neither Papai nor HTB appealed the ALJ's Decision and Order of August 27, 1992. Thus it became final and binding.

3. The Appeal of the Civil Action.

On September 25, 1995, the Ninth Circuit Court of Appeals (Judge Poole dissenting) reversed the District Court's ruling on summary judgment that Papai was not a seaman and held that a jury should have decided that issue. (Appendix A.) The Ninth Circuit also held that the ALJ's decision that Papai was an LHWCA worker and not a seaman did not bar Papai's claim to seaman remedies in the civil action. The Ninth Circuit's decision is reported at 67 F.3d 203.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER A CLAIMANT CAN SUE FOR SEAMAN REMEDIES EVEN AFTER AN ADMINISTRATIVE AGENCY HAS FORMALLY FOUND THAT THE CLAIMANT WAS NOT A SEAMAN.

The Supreme Court has clearly held that LHWCA worker remedies and seaman remedies are mutually exclusive. The Fifth Circuit has held that a formal finding of LHWCA worker (*i.e.*, non-seaman) status precludes a claimant from thereafter seeking seaman remedies. A decision by the Second Circuit

reached the same result. The Ninth Circuit's decision in this case, however, allows Papai to seek seaman remedies despite the ALJ's formal finding that he was an LHWCA worker, not a seaman. The Ninth Circuit's decision thereby creates a conflict among the Circuits with regard to the proper interpretation of the statutory scheme.

A. Seaman Remedies And LHWCA Remedies Are Mutually Exclusive.

1. Seaman Remedies (The Jones Act).

The Jones Act, passed in 1920, provides a cause of action in negligence to any "seaman" injured in the course of his employment. 46 U.S.C. § 688(a). Under the general maritime law before 1920, an injured seaman could seek damages from the shipowner if the injuries were caused by the vessel's unseaworthiness. An injured seaman also was entitled to "maintenance" (subsistence) and "cure" (medical care) until he recovered from the injury. However, the seaman could not sue for negligence. The Jones Act added a negligence cause of action against the employer to the seaman's potential remedies for injury. *Chandris, Inc. v. Latsis*, __ U.S. __, 115 S. Ct. 2172, 2183 (1995).

2. LHWCA Remedies.

The LHWCA (33 U.S.C. § 901 *et seq.*) was enacted in 1927 to provide a form of workers compensation in lieu of tort damages for land-based maritime workers, particularly longshoremen, but also including other employees who perform work in connection with vessels. As of 1927 such workers generally were excluded from state workers compensation coverage. The LHWCA requires an employer to provide wage compensation and medical benefits to an injured LHWCA worker regardless whether the employer was at fault for the

injury, so long as the injury arises out of the worker's employment. In return for compelling the employer to pay the wage compensation and medical benefits regardless of fault, the LHWCA sets a schedule of benefits and grants the employer immunity from tort liability for the injury. 1 Schoenbaum, *Admiralty and Maritime Law* (2d Ed. 1994), pp. 371-2.

In addition to the scheduled LHWCA benefits, an injured LHWCA worker has the right to sue third parties for negligence causing the injury. 33 U.S.C. § 905(b). Such third parties include the owner and operator of the vessel on which the worker is injured. Under the so-called "dual capacity doctrine," the worker can sue the shipowner even if the shipowner also is his employer, but the worker can sue the dual shipowner/employer only for negligence in its shipowner capacity, not for negligence in its employer capacity. *Reed v. Yaka*, 373 U.S. 410 (1963). (Thus in this case Papai as an LHWCA worker was able to sue HTB for negligence — even though HTB was Papai's employer and paid him LHWCA benefits — in HTB's capacity as the operator of the Tug.)

3. Seaman Status And LHWCA Worker Status Are Mutually Exclusive.

The Supreme Court has stated several times recently that seaman status and LHWCA worker status are mutually exclusive, not concurrent. A worker can be a seaman or an LHWCA worker, but not both.

In *McDermott Intern., Inc. v. Wilander*, 498 U.S. 337 (1991), the Supreme Court stated:

> The Act [LHWCA] provides recovery for injury to a broad range of land-based maritime workers, but explicitly excludes from its coverage "a master or member of a

> crew of any vessel." 33 U.S.C. § 902(3)(G). This Court recognized the distinction, albeit belatedly, in *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946), concluding that the Jones Act and the LHWCA are mutually exclusive. The LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to "a master or member of a crew of any vessel" . . . "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act.

In *Chandris, Inc. v. Latsis*, 115 S. Ct. 2172, 2183, the Supreme Court stated:

> Congress provided some content for the Jones Act [seaman status] requirement in 1927 when it enacted the Longshore and Harbor Workers' Compensation Act (LHWCA), which provides scheduled compensation (and the exclusive remedy) for injury to a broad range of landbased maritime workers but which also explicitly excludes from its coverage "a master or member of a crew of any vessel." [Citations omitted.] As the Court has stated on several occasions, the Jones Act and the LHWCA are mutually exclusive compensation regimes. . . .

Therefore a claimant has standing to assert a cause of action under the Jones Act (46 U.S.C. § 688) or the general maritime law only if he is a "seaman" at the time of his injury. If he is a seaman,

then he is not entitled to benefits under the LHWCA. 33 U.S.C. § 902(3)(G). Conversely, if the claimant is an LHWCA worker rather than a seaman, then he is entitled to compensation benefits under the LHWCA, and he can assert a cause of action for negligence under § 905(b) of the LHWCA, but he cannot sue under the Jones Act or the general maritime law.

As described above, the ALJ — after formal hearing — determined that Papai was an LHWCA worker and not a seaman. The issue now is not whether the ALJ was correct in that decision. The ALJ's decision was not appealed, and therefore it is final. The issue now is the effect of that final ALJ decision, namely whether it bars Papai from seeking seaman remedies thereafter.

B. A Claimant May Initially Pursue Both LHWCA Remedies And Seaman Remedies Without Having to Make an Election of Remedies.

The mere receipt of LHWCA benefits, which often are paid voluntarily by an employer in the absence of a formal LHWCA award, does not in itself preclude seaman status. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). Therefore a claimant may pursue both potential remedies — LHWCA and seaman (including the Jones Act) — until his status is formally determined.

The *Gizoni* decision interpreted the statutory scheme as not intended to force the injured worker to make an initial election of remedies that could preclude any recovery at all. *Gizoni* is consistent with the modern view that the common law "election of remedies" doctrine is excessively harsh. *See* 18 Wright, Miller & Cooper, *Federal Practice and Procedure* (1981) § 4477, at p. 773. If an election of remedies approach were applied, a plaintiff might pursue an LHWCA action believing that he was a seaman, receive interim benefits under the LHWCA, but be denied benefits by the ALJ on the ground that he

was not in fact a seaman — and then be unable to pursue a Jones Act remedy because he had elected an LHWCA remedy. Thus, making the worker choose between the potential right to an immediate workers compensation remedy and the Jones Act remedy to which he or she may be entitled would "force injured maritime workers to an election of remedies we do not believe Congress to have intended." *Gizoni*, 502 U.S. at 92 n.5.

C. The Fifth, Second And Ninth Circuits Are In Conflict About Whether A Claimant Who Has Been Formally Determined To Be An LHWCA Worker Still Can Pursue Seaman Remedies.

The rule in the Fifth Circuit and Second Circuit is that a formal finding of LHWCA worker status bars a claimant from seeking further remedies as a seaman. The Ninth Circuit rule promulgated in this case is in direct conflict with the law in these other Circuits.

1. The Position of the Fifth Circuit and Second Circuit.

In the Fifth Circuit a formal award of LHWCA compensation benefits precludes further claim to seaman remedies. *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992). In *Sharp* the Fifth Circuit held that an ALJ order approving a settlement of LHWCA benefits precluded subsequent seaman remedies. The *Sharp* Court emphasized that while Congress did not intend that a claimant forfeit the right initially to pursue both remedies simultaneously, Congress also did not intend that the claimant be able to pick and choose his ultimate recovery based upon which remedy has conferred upon him a larger award.

The Fifth Circuit in *Sharp* explained the rationale for its conclusion:

> Our holding is consistent with the purpose of the LHWCA .... The LHWCA was not designed to create a mere safety net, guaranteeing workers a minimum award as they seek greater rewards in court. Rather, it has a benefit to employers, too, giving them limited and predictable liability in exchange for their giving up their ability to defend tort actions. [Citations omitted.] Permitting a Jones Act proceeding after a formal compensation award here would defeat the purpose of the LHWCA, as well as work an unfairness.... [973 F.2d at 426-7.]

The Fifth Circuit also explained the principles underlying the preclusive effect of an ALJ's determination of a claimant's LHWCA status in *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132-1133 (5th Cir. 1991):

> Permitting a trial court to redetermine issues decided by the administrative system effectively defeats the purpose of the LHWCA. Instead of creating certainty for both employer and employee, permitting a trial court to redetermine the coverage issue reintroduces uncertainty for both. Instead of lowering the cost of recovery for an injured worker, the worker must pay counsel both for representation on the LHWCA claims and again in seeking a jury award. Furthermore, if we permit a trial court and the Department to reach inconsistent determinations of the coverage issue, an injured worker may receive both a jury trial and an LHWCA remedy, or neither, despite the intention of Congress that he receive one or the other. In

enacting the LHWCA, Congress intended that it be the sole and exclusive remedy for workers within its scope, not a stepping stone on the way to a jury award.

While we recognize that there are differences between the fact-finding processes in the administrative forum and in the judicial forum, we doubt that these differences are sufficient to deprive an injured employee of a fair opportunity to present the coverage issue before the Department. As a result, a finding of LHWCA coverage sought and obtained by the injured worker from the Department should preclude any subsequent action against his employer for the same injury.

The Second Circuit also has decided that a formal finding of LHWCA worker status precludes subsequent recovery as a seaman. *Hagens v. United Fruit Co.*, 135 F.2d 843 (2d Cir. 1943) (holding that where a worker had received a formal award of compensation under the LHWCA, he was barred from seeking seaman remedies under the Jones Act). *See also Roth v. McAllister Bros., Inc.*, 316 F.2d 143 (2nd Cir. 1963), in which a tugboat operator had prevailed in a New Jersey workers compensation proceeding on the ground that the claimant was a seaman (and thus excluded from compensation coverage). The Court held that the tugboat operator was estopped from arguing in a subsequent Jones Act action that the plaintiff was not a seaman, stating that the plaintiff could not "assume a contrary position in a subsequent proceeding elsewhere simply because its interests have changed. . ." *Roth*, 316 F.2d at 145.

The leading treatise on the subject is in agreement that a finding of non-seaman status in an LHWCA proceeding bars

further remedies as a seaman. 4 Larson, *The Law of Workmen's Compensation* (1989) § 90.51(c), at p. 16-519 states:

> But when all of the cases in which for assorted reasons the requisites of a true res judicata case were incomplete are set to one side, there remains the basic rule that if the Deputy Commissioner [of the Department of Labor] has made a valid and specific finding of noncrewmember status, in a case in which this question has been put in issue and in which the parties have had an opportunity to address themselves to the matter, that finding should be res judicata on the issue of crew member status and should bar a subsequent Jones Act proceeding.

See also 1 Schoenbaum, *Admiralty and Maritime Law* (2nd Ed. 1994), § 6.9, at p.260 n.38 ("A worker cannot play on both sides of the street too long; if he accepts a formal compensation award, he will be barred from bringing a Jones Act action for the same injuries.")

2. The Position of the Ninth Circuit.

The Ninth Circuit's decision in this case recited the principle of the mutual exclusivity of LHWCA remedies and seaman remedies, and agreed that the ALJ had "fully adjudicated" Papai's LHWCA claim, including his status as an LHWCA worker (non-seaman). Nevertheless, the Ninth Circuit held that despite the ALJ's finding, Papai is allowed to seek seaman remedies against HTB.

In coming to its decision, the Ninth Circuit pointed out that the claimant will not receive a double recovery, because the amount paid under one remedy scheme is credited against the

amount owed under the other.[2] The Ninth Circuit believed that in relying on the absence of a double recovery to deny preclusive effect to the ALJ's finding, it had support from certain dictum in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).[3] The Ninth Circuit was concerned with the fairness in barring an LHWCA worker from seeking seaman remedies — the employer might have a disincentive to litigate vigorously its defense in the LHWCA action since the parties may be on opposite sides of the seaman status issue in that proceeding compared with the civil suit. The Ninth Circuit also noted that imposing a bar would result in subjecting to civil suit an employer who voluntarily paid LHWCA compensation benefits while immunizing from suit an employer who forces the employee to seek compensation through a formal LHWCA proceeding. Finally, the Ninth Circuit's decision relied upon Gilmore & Black, *The Law of Admiralty* (2d Ed. 1975), p. 435, which asserted the policy preference that the award of LHWCA benefits should be treated as an entitlement, but not a bar to a future damage recovery as a seaman. (67 F.3d at 207-08; Pet. App. pp. 11a-12a.)

2. This is not completely so, because it does not take attorney fees into account, and because the credits are not congruent with the amounts the employer has paid. *Massey v. Williams McWilliams, Inc.*, 414 F.2d 675, 679-80 (5th Cir. 1969).

3. The Ninth Circuit stated that its decision to allow a claimant to pursue both remedies to conclusion was "extending the reasoning of the *Gizoni* Court to the next logical step . . ." *Papai*, 67 F.3d at 208 (Pet. App. p. 12a), referring to the Supreme Court's reasoning in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). In *Gizoni*, the employer had argued that the employee's receipt of benefits under the LHWCA should preclude the claimant's subsequent claim under the Jones Act, even though his status had not been litigated before the ALJ. The Supreme Court stated: "It is by now 'universally accepted' that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act. [Citations omitted.] *This is so, quite obviously, because the question of coverage has never actually been litigated.*" (Emphasis added.) *Gizoni, id.*, 502 U.S. at 91. Contrary to the Ninth Circuit's decision, the implication is that if coverage (status) *had* been litigated, the employee could not later seek relief under the Jones Act.

D. This Court Should Grant Certiorari to Resolve This Conflict Among The Circuits.

A clear conflict exists among the Second, Fifth, and Ninth Circuits about whether an ALJ's formal finding of LHWCA worker status precludes the claimant from then seeking seaman remedies. These three Circuits are heavily involved with such maritime law issues. The Fifth Circuit includes the Gulf Coast (from which seaman status issues most frequently arise), the Ninth Circuit includes all U.S. West Coast ports, and the Second Circuit includes the port of New York. These three Circuits accounted for 86% of all Jones Act maritime personal injury claims filed in 1995.[4]

The conflict among these Circuits is not limited to the holdings on the facts of the cases on this point; the Circuits have fundamental policy differences. The policy underlying the Ninth Circuit's decision in *Papai* (and stated in Gilmore & Black) is in sharp conflict with the policy underlying the decisions in *Sharp* and *Fontenot* (and stated in Larson). While both Courts recite that LHWCA remedies and seaman remedies are "mutually exclusive," the Fifth Circuit interprets that to mean that a claimant can be an LHWCA worker or a seaman but not both, while the Ninth Circuit interprets that to mean that a claimant can recover under both remedy schemes and choose the higher award, so long as he does not receive a double recovery.

This is a fundamental conflict about a central principle underlying the LHWCA and seaman remedy schemes. The Fifth Circuit takes the position that in exchange for obtaining a formal

4. Some 869 civil cases involving marine personal injury claims under the Jones Act were commenced in U.S. district courts in 1995. Of these cases, 746 were in the Second, Fifth, and Ninth Circuits. Memorandum from Mr. Maurice Galloway, Administrative Office of the United States Courts, Statistics Division, March 21, 1996. A copy of this memorandum is being lodged with the Court.

determination of LHWCA status and thereby ensuring a secure LHWCA remedy, the claimant forfeits the ability to argue in a later Jones Act action that the LHWCA was inapplicable. The Fifth Circuit sees the LHWCA and the Jones Act as balancing the interests of employee and employer, allowing the employee to obtain a secure remedy, if desired, in exchange for eliminating the risk of a trial for both the employee and employer. *See Fontenot,* 923 F.2d at 1132-33 n.38. Conversely, the Ninth Circuit's decision reflects the view that the fundamental purpose of Congress in enacting these statutes was to protect injured employees, and therefore the Ninth Circuit allows an employee not just to pursue initially, but also to litigate to the end, inconsistent positions in order to obtain the maximum recovery possible.

The decision on this issue is of vital interest to the maritime industry. The Ninth Circuit's decision will multiply the already significant number of litigated and administrative controversies about LHWCA or seaman status and the relationship between LHWCA remedies and seaman remedies.[5] As is described in *Sharp* and *Fontenot,* these issues have significant economic ramifications both to workers and employers. Further, seaman status is an issue of federal maritime law, which is supposed to be national and uniform in its approach. *Southern Pacific v. Jensen,* 244 U.S. 205 (1917). The conflict among the Circuits creates disuniformity and confusion regarding the effect of a formal finding of LHWCA worker status.

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5. LHWCA compensation totalling $604.3 million was paid to workers in 36,577 cases in Fiscal Year 1992, the latest year for which published statistics are available. *See* Annual Report to Congress of the U.S. Department of Labor, Office of Workers' Compensation Programs (FY 1992), at 21. The Department of Labor adjudicated 3,558 cases under the LHWCA in Fiscal Year 1995. Memorandum from Ms. Seena K. Foster, Senior Staff Attorney, Office of Administrative Law Judges, U.S. Department of Labor, March 26, 1996. A copy of this memorandum is being lodged with the Court.

E. The Significance of this Case Is Not Limited to Its Statutory Context But Raises Broader Questions Regarding the Estoppel Effect to Be Accorded to Administrative Agency Decisions.

The Ninth Circuit's decision in *Papai* reflects a broader reluctance to apply estoppel principles to claims that involve issues raised in prior administrative proceedings. The Ninth Circuit's approach is in accord with the view of a number of academic commentators but is inconsistent with the approach taken by other Circuits.

The Supreme Court has made clear that absent contrary legislative intent, collateral estoppel should presumptively apply to issues finally decided in a prior administrative proceeding, if the administrative agency was acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate. *See Astoria Federal Savings & Loan Assn. v. Solimino,* 501 U.S. 104 (1991). *See also University of Tennessee v. Elliott,* 478 U.S. 788 (1986); *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394 (1966).

However, legal commentators have criticized the application of estoppel principles to bar claims by plaintiffs that involve issues raised in prior administrative proceedings.[6] In

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6. *See* Marjorie A. Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims,* 65 Indiana L. Rev. 367 (1990); Jay Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?,* 55 Fordham L. Rev. 63 (1986); Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings,* 35 U. Fla. L. Rev. 422 (1983); David A. Brown, Note, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?,* 73 Cornell L. Rev. 817 (1988). For a view that *res*

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particular, commentators have suggested that the savings in judicial time and resources from the application of administrative estoppel principles should be outweighed by the plaintiff's interest in obtaining a judicial forum for vindication of his or her federal claims.[7]

While the Ninth Circuit's decision in *Papai* does not expressly refer to these criticisms of administrative estoppel, the Court's decision demonstrates a reluctance to apply estoppel principles to bar a plaintiff from relitigating issues decided by an administrative body.

As noted above, the Supreme Court has held that final administrative agency decisions are entitled to collateral estoppel effect if specified conditions are met, absent legislative intent to the contrary. *See Solimino*, 501 U.S. 104. In *Solimino*, the Supreme Court recognized that the presumption of administrative estoppel should apply except "'when a statutory purpose to the contrary is evident.'" 501 U.S. at 108, quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). The Supreme Court declined to require that Congress "state precisely any intention to overcome the presumption's application to a given statutory scheme," stating that the presumption should apply "where Congress has failed expressly or impliedly to evince any intention on the issue." *Solimino*, 501 U.S. 104, 108, 110.

While *Solimino* makes clear that Congress need not "state precisely" its intention to overcome the presumption of administrative estoppel, the Supreme Court did not decide in *Solimino* what quantum of legislative intent is necessary for a

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judicata principles should apply to administrative agency determinations made in a judicial capacity, *see* Kenneth C. Davis, 4 *Administrative Law Treatise* (2d Ed. 1983), § 21:3, at 53.

7. *See* Perschbacher, at 450; Silver, at 369.

court to find that Congress intended to overcome this presumption. It was not necessary for the Supreme Court to decide this question, since it found that the statute at issue in *Solimino* contained provisions which "make clear that collateral estoppel is not to apply." 501 U.S. 104, 110-11.

In *Papai*, the Ninth Circuit has identified this legislative intent in a manner that will minimize the application of collateral estoppel to issues raised in prior administrative proceedings, and is inconsistent with the approach taken by other Circuits. Specifically, the Ninth Circuit has adopted an approach under which courts have broad discretion to identify congressional intent to overcome the presumption of administrative collateral estoppel.

The requirements for applying administrative collateral estoppel were met in *Papai*. The Ninth Circuit in *Figueroa v. Campbell*, 45 F.3d 311 (9th Cir. 1995), set forth the requirements for collateral estoppel in a seaman status context: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must be actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must be a critical and necessary part of the judgment in the earlier action.[8]

These requirements were met in *Papai:* (1) The question of seaman/non-seaman status, which is the same issue that would be presented to a jury in this case, was presented to the ALJ; (2) The issue was actually litigated in the administrative proceeding; (3) Determination of the issue by the ALJ was

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8. Since the record in *Figueroa* did not reflect an express finding by an ALJ or any other administrator that Figueroa was not a seaman, collateral estoppel was held inapplicable to the facts in that case. In this regard, *Figueroa* is in conflict with the Fifth Circuit's decision in *Sharp*, which held that a final award of benefits under the LHWCA necessarily involves a finding that the claimant is not a seaman because the two statutory schemes are mutually exclusive. *See Sharp*, 973 F.2d 423, 426.

necessary since if Papai was a seaman, then he was not entitled to LHWCA benefits. In addition, the *Solimino* standard for applying collateral estoppel to agency determinations was met, since the ALJ was acting in a judicial capacity and resolved a disputed issue of fact (Papai's seaman status) which the parties litigated. Thus the Ninth Circuit in Papai's case was squarely faced with the issue of whether the ALJ's determination of Papai's status should be given preclusive effect.

In its decision, the Ninth Circuit did not contend that any element of administrative collateral estoppel was absent, but rather avoided this issue by identifying policy reasons for allowing a plaintiff to pursue seaman remedies notwithstanding an earlier ALJ finding that the plaintiff was not a seaman. After expressing its concerns regarding the "fairness" of applying a bar to the Jones Act claim, the Ninth Circuit held that it was the "next logical step" to find that Congress intended to allow a plaintiff to seek seaman remedies even after the plaintiff had prevailed in a prior LHWCA proceeding. *Papai*, 67 F.3d at 208, Pet. App. p. 12a. The Court did not refer to particular statutory provisions or legislative history as justifying its conclusion that Congress intended to override the presumption of administrative collateral estoppel (other than referring to the LHWCA provision which prevents a double recovery). Rather, the Ninth Circuit's decision in *Papai* interprets *Solimino* to allow the presumption of administrative collateral estoppel to be overcome based on a court's view of the policy underlying the statute involved.

This approach to identifying Congressional intent is inconsistent with the approach in other Circuits, which have looked to the language and structure of the relevant statute and, if necessary, the statute's legislative history to determine whether Congress intended to overcome the presumption of administrative collateral estoppel. *See East Food & Liquor, Inc. v. United States*, 50 F.3d 1405, 1411 (7th Cir. 1995) (neither the "plain language" of the statute nor its purpose demonstrated that

Congress intended to overcome the presumption of administrative collateral estoppel); *JSK By and Through JK and PGK v. Hendry County School Board*, 941 F.2d 1563 (11th Cir. 1991) (language and legislative history of statute demonstrated that Congress intended to overcome the preclusive effect of agency action); *DeCintio v. Westchester County Medical Center*, 821 F.2d 111, 118 n.13 (2nd Cir. 1987) ("nothing in the statutory language" demonstrated Congressional intent to overcome collateral estoppel principles).

This conflict reflects a broader issue regarding appropriate techniques of statutory interpretation. The Ninth Circuit's approach to interpreting the statutory scheme in *Papai* allows courts significant discretion in identifying Congressional intent based on their understanding of the statutory policy, while the decisions in other Circuits take an approach that hews more closely to particular statutory provisions enacted by Congress. The Supreme Court has repeatedly warned that:

> [N]o legislation pursues its purposes at all costs. Deciding whether competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (per curiam) (emphasis in original); *PBGC v. LTV Corp.*, 496 U.S. 633, 646-47 (1990); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). The Ninth Circuit identified congressional intent through its own construction of the broad objective of the statute, a task of which courts should always be wary, and particularly so when the issue is whether Congress

intended to overcome a common-law presumption.[9]

If the Ninth Circuit maintains its current approach, and if other Circuits follow its lead, the presumption of administrative estoppel would be seriously weakened in cases involving statutory remedies. The Supreme Court has said that the presumption of administrative collateral estoppel serves important values, namely "the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources." *Elliott*, 478 U.S. 788, 798. By allowing this presumption to be overcome simply on the basis of a court's understanding of a statute's general policy, the Ninth Circuit's decision greatly restricts parties' ability to rely on the presumption in cases involving statutory remedies and will lead to an increase in litigation over whether Congress intended to overcome the presumption, thereby vitiating the original purpose of the presumption to conserve judicial resources.

The Supreme Court should resolve this uncertainty regarding the showing of legislative intent needed to overcome the presumption of administrative estoppel. This administrative law issue has importance beyond the maritime context presented here. It potentially affects any proceedings brought pursuant to a statutory scheme which contemplates separate administrative and judicial determinations. Given the broader importance of this issue to administrative law, the Supreme Court should set out a clear approach to guide the lower courts.

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9. For instance, even assuming that Congress' broad objective was to protect injured employees, this policy could lead to different conclusions as to whether to overcome the presumption of administrative collateral estoppel. As noted by the Fifth Circuit in *Fontenot*, allowing inconsistent coverage determinations could result in an LHWCA determination that a worker was a seaman (hence denying recovery) and a Jones Act determination that the worker was not a seaman (hence denying recovery). 923 F.2d at 1133 n.39. Thus, assuming that Congress primarily intended to protect injured employees, this purpose does not support the conclusion that Congress intended to overcome the presumption of administrative collateral estoppel.

II. THIS COURT SHOULD RESOLVE A SEPARATE CONFLICT AMONG THE CIRCUITS ABOUT WHETHER A CLAIMANT'S SEAMAN STATUS SHOULD BE BASED UPON HIS ENTIRE WORK HISTORY WITH ALL HIS EMPLOYERS OR HIS WORK HISTORY WITH HIS EMPLOYER AT THE TIME OF INJURY.

The Ninth Circuit's majority opinion (Judge Poole dissenting) contradicts the authority of the Fifth Circuit and the Third Circuit by allowing a claimant's status as a seaman or not to be determined by his work history with all his employers, not just with the employer for whom he was working when he was injured. The Ninth Circuit opinion states that the standard to be used in determining seaman status shall be:

> In short, all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, as well as work performed for other employers during the relevant time should be considered in making the determination. [67 F.3d at 206, Pet. App. p. 8a.]

This standard departs from precedent in extending the scope of the seaman status inquiry to work performed after the accident. However, the most clear conflict that the Ninth Circuit standard creates with other Circuits is its directive that the seaman status inquiry can now include the claimant's work for *all* his employers "during the relevant time" (a phrase that the Ninth Circuit opinion does not define or explain). Such a standard conflicts with prevailing authority in the Fifth Circuit and Third Circuit.

A. The Ninth Circuit Decision Contradicts The Fleet Seaman Doctrine Prevailing In Other Circuits.

Chandris requires (as had prior law) that to be a seaman a claimant must have "a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." 115 S.Ct. 2172, 2190.

The question presented is whether the claimant's connection must be to a group of vessels operated by the same employer, or to a broader group of vessels, such as all the vessels upon which the claimant has worked during the "relevant time." This issue arises when a maritime worker is not attached to one particular vessel but performs work on a number of different vessels, to none of which he has a "permanent" or even "substantial" connection.

To answer this question, the Fifth Circuit has developed the "Fleet Seaman Doctrine." That Doctrine holds that a claimant may be a seaman, even if he does not have a permanent or substantial connection to the vessel on which he was injured, so long as he had a permanent or substantial connection to a fleet of vessels *under common ownership or control.*

> By fleet we mean an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated.

Barrett v. Chevron, U.S.A. Inc., 781 F.2d 1067, 1074 (5th Cir. 1986, en banc). *Accord Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 324 (5th Cir. 1991), *vacated and remanded*, 500 U.S.

949, *reinstated on remand*, 947 F.2d 1290 (5th Cir. 1991); *Campo v. Electro-Coal Transfer Corp.* 970 F.2d 51, 52 (5th Cir. 1992).

The Third Circuit, finding the Fleet Seaman Doctrine to be a reasonable extension of Supreme Court precedent, adopted the Doctrine in *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247, 1256 (3d Cir. 1994). The Third Circuit also adopted the rule that the "fleet" to be considered is that of the claimant's employer when the claimant was injured.

> The key to the Fleet Seaman Doctrine is that the seaman maintain the employment relationship with the same employer. The term "fleet" refers to the fleet of vessels owned by the employer, not the fleet of vessels on which the employee has worked. [26 F.3d at 1256.]
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> * * *
>
> We agree with the en banc opinion in Barrett, that a fleet is an identifiable group of vessels acting together or under one control . . . The case law uniformly rejects the claim that "fleet" means any group of vessels an employee happens to work aboard. [26 F.3d at 1257-8.]

Conversely, the Ninth Circuit's opinion in this case allows (indeed compels) a review of the claimant's work on vessels of all his employers during the "relevant time".

B. The Ninth Circuit's Decision Is Based On A Misreading Of Dictum In The Supreme Court's Opinion In *Chandris v. Latsis.*

The Ninth Circuit's decision on this point is based upon a misreading of the following sentence of dictum in *Chandris:*

"'On the other hand, we see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer.'" 67 F.3d at 206, Pet. App. p. 7a, quoting *Chandris*, 115 S.Ct. at 2191. That portion of the *Chandris* opinion was addressing the need in some cases to judge the claimant's connection to a vessel or fleet of vessels not on the overall course of the claimant's work history with the employer who operates the vessel on which the claimant is injured, but on the claimant's current assignment with that employer. For instance, the Supreme Court stated, someone who worked for years in an employer's shoreside headquarters but who is then reassigned to a ship in a classic seaman's job and is injured shortly after the reassignment is a seaman. Conversely, said the Court, someone who is transferred to a desk job in the company's office and who is injured in the hallway is not entitled to seaman status on the basis of prior service at sea. *Id.*, 115 S.Ct. at 2191.

It was in this context that the Supreme Court stated that it sees "no reason to limit the seaman status inquiry ... exclusively to an examination of the overall course of a worker's service with a particular employer." The key words in this sentence are "overall course," not "particular employer." This sentence was intended to narrow the seaman status inquiry to the material part of the claimant's work history with a particular employer. The Ninth Circuit's opinion turns the sentence upside down and interprets it as an instruction to greatly expand the seaman status inquiry by including the claimant's work with all his employers. That decision puts the Ninth Circuit in clear conflict with the Fifth Circuit and Third Circuit.

C. The Court Should Resolve The Conflict Among The Circuits About Whether Seaman Status Should Be Based Upon A Claimant's Work History With All His Employers.

One of the few certain elements of the seaman status test

over the years has been that the claimant's status was to be determined relative to the particular employer for whom he was working when he was injured. The Fleet Seaman Doctrine extended the analysis — where appropriate — to include the claimant's work on all the vessels of his employer, not just the vessel involved in the accident. The Ninth Circuit's opinion now puts the claimant's entire work history for all employers into play when determining seaman status. This approach creates the possibility that if an employer hires a worker to do desk work, and the worker suffers an injury, the employer will be subject to the lenient Jones Act negligence standard simply because — unbeknownst to the employer — the worker had previously worked as a seaman for other employers.

The Ninth Circuit's opinion, by removing the limits of the Fleet Seaman Doctrine, does what the Fifth Circuit in *Barrett* expressly sought to avoid: it "totally obliterates" the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen. Certainly the conflict between the Circuits will lead to inconsistent results on seaman status in the different Circuits.

CONCLUSION

For the foregoing reasons, HTB's Petition for a Writ of Certiorari should be granted.

Dated: April 9, 1996

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED SEPTEMBER 25, 1995

John PAPAI, Joanna Papai,
Plaintiffs-Appellants,

HARBOR TUG AND BARGE COMPANY,
Defendant-Appellee.

No. 93-15132.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 9, 1994.

Decided Sept. 25, 1995.

* * *

Thomas J. Boyle, Law Offices of Thomas J. Boyle, San Francisco, CA, for plaintiffs-appellants.

Eric Danoff, Graham & James, San Francisco, CA, for defendant-appellee.

Appeal from the United States District Court for the Northern District of California.

Before: POOLE and REINHARDT, Circuit Judges, and TAKASUGI,[1] District Judge.

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1. Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

Appendix A

Opinion by Judge TAKASUGI; Dissent by Judge POOLE.

TAKASUGI, District Judge:

This case arises from a knee injury sustained by plaintiff John Papai while in the course and scope of his employment for defendant Harbor Tug and Barge Company on board the tug *Point Barrow*. Plaintiff appeals the granting of a partial summary judgment and a subsequent judgment for the defendant after a court trial. Because we hold that summary judgment was granted in error, we do not reach plaintiffs challenge to the court's findings made at trial.

This appeal raises two issues:

1. What factors are relevant to the determination of seaman status under the Jones Act, 46 U.S.C App. §§ 688, *et seq.*, in terms of the requirement that the claimant have a substantial connection with the vessel; and

2. Whether plaintiff's receipt of compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") precludes him from also recovering as a seaman under the Jones Act.

I. BACKGROUND

A. Facts[2]

Plaintiff worked at various maritime related jobs for various

2. Because this is an appeal from the grant of summary judgment in favor of the defendant, the issue is whether genuine issues of material fact were remaining such that the grant of summary judgment was in error. As such, the (Cont'd)

Appendix A

companies and obtained his maritime jobs through the hiring hall of the Inland Boatman's Union of the Pacific ("IBU"). He was not a permanent employee of defendant. Defendant along with other companies is a party to a Deckhands Agreement with the IBU pursuant to which the vessels obtain their deckhands through the union. Apparently, there was no permanent crew on any of the vessels and assignments were made on a day-to-day basis.

Plaintiff had worked for defendant as a deckhand on twelve previous occasions in 1989, and on March 13, 1989, plaintiff was dispatched by the IBU hiring hall to perform maintenance for one day on defendant's tug *Point Barrow*, under the supervision of defendant's Port Captain.

Plaintiff was injured when he fell from a ladder while painting the vessel.

B. Procedural History

In January 1990, plaintiff John Papai filed his complaint against defendant Harbor Tug and Barge seeking damages under the Jones Act, 46 U.S.C.App. §§ 688, *et seq.*, and for unseaworthiness under general maritime law. His wife, plaintiff Joanna Papai, sued for loss of consortium.

Defendant moved for summary judgment on the ground that

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facts relevant on appeal are not limited to those established and undisputed below but, rather, also include those facts that were sufficiently supported by evidence to raise a genuine issue of their existence. Accordingly, the facts discussed herein include both those that were established and undisputed below as well as those that were sufficiently supported by evidence to be considered in dispute.

plaintiff John Papai was not a seaman within the meaning of the Jones Act and general maritime law. The district court granted the motion on May 29, 1990.

Pursuant to leave of court, plaintiffs filed a first amended complaint under Section Five of the LHWCA and for loss of consortium.

In denying reconsideration on the summary judgment, the court certified the question under 28 U.S.C. § 1292(b) for interlocutory appeal, which was denied by the Ninth Circuit on October 30, 1990. The subject was then rebriefed and reargued to the district court in light of two recent Supreme Court decisions (*McDermott International, Inc. v. Wilander,* 498 U.S. 337,111 S.Ct. 807, 112 L.Ed.2d 866 (1991); *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991)), and the district court reaffirmed that plaintiff was not a seaman on the basis that he did not have the necessary permanent connection with the vessel.

After the district court granted summary judgment on plaintiff's Jones Act claim on May 29, 1990, plaintiff filed a compensation claim under the LHWCA against defendant as his employer. On June 2, 1992, a hearing was held before an Administrative Law Judge. The ALJ issued a written Decision and Order in favor of compensation for plaintiff on August 27, 1992. The August 27, 1992, Decision and Order was not appealed and is, thus, final.

After a court trial in the matter before the district court, judgment was entered in favor of defendant and against plaintiffs on December 29, 1992. Plaintiffs filed their notice of appeal on January 20, 1993 challenging the district court's grant of

summary judgment on the Jones Act claim and the judgment rendered after the court trial on the claim under Section Five of the LHWCA and common law negligence. This court holds that it was error to grant summary judgment on plaintiff's Jones Act claim and that said claim is not rendered moot by reason of plaintiff's receipt of compensation benefits under the LHWCA.

II. JURISDICTION

This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1291.

III. DISCUSSION

A. Seaman Status Under the Jones Act

Seaman status, which is required for recovery under the Jones Act, is a mixed question of law and fact. Nevertheless, it may be determined by summary judgment in appropriate circumstances. *Wilander,* 498 U.S. at 355-56, 111 S.Ct. at 817-18.

Formulation of the seaman status test was recently addressed by the Supreme Court in *Chandris, Inc. v. Latsis,* __ U.S. __, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995):

> [W]e think that the essential requirements for seaman status are twofold. First, as we emphasized in *Wilander,* "an employee's duties must contribut[e] to the function of the vessel or to the accomplishment of its mission." . . .
>
> Second, and most important for our

purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

* * * * * *

In our views, "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." [Citation.] The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

* * * * * *

[S]eaman status is not *merely* a temporal concept, but we also believe that it necessarily includes a temporal element. A maritime worker who spends only a small action of his working time on board a vessel is fundamentally land-based and therefore not a member of the vessel's crews, regardless of what his duties are. Naturally, substantiality in this context is determined by reference to

> the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure.

Id. at 2191.

Thus, the inquiry is not whether plaintiff had a permanent connection with the vessel. The proper inquiry is whether plaintiff's relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment. Scrutiny of the "total circumstances" is, necessarily, fact specific. On one hand, the status of a worker may change by a change in work assignment. One the other hand, it may be necessary to examine the work performed by the employee while employed by different employers during the relevant time period. As was stated by the Supreme Court in *Chandris:*

> [W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer. . . . When a maritime worker's basic assignment changes, his seaman status may change as well. . . . If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.

Id. at 2191-92.

There would appear to be no reason that a group of employers who join together to obtain a common labor pool on which they draw by means of a union hiring hall (in this case, the Inland Boatman's Union hiring hall), should not be treated as a common employer for purposes of determining a maritime worker's seaman status. If the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system.[3] Under such circumstances, a maritime worker who regularly performs seaman's work is entitled to seaman status. Moreover, in the case before us, the plaintiff actually worked for Harbor Tug and Barge Company on far more than a single occasion. As we have noted earlier, he worked for that company on a dozen occasions over the two and a half month period preceding his injury. This circumstance may in itself provide a sufficient connection.

In short, all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, as well as work performed for other employers during the relevant time should be considered in making the determination.

It was error for the District Court to have granted summary

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3. Under the dissent's view, a master, mate, or pilot who works on tug boats every day is not a seaman simply because he receives his assignments through a hiring hall from which a group of vessels have collectively agreed to obtain employees and he may be assigned to different vessels on a daily or weekly basis. We simply do not read the "group of vessels" doctrine so narrowly. In any event, the plaintiff in this case worked a substantial period of time for a particular vessel owner.

judgment on plaintiff's Jones Act claim since issues of fact remained as to plaintiff's connection with the vessel.[4]

B. Effect of Receiving LHWCA Benefits on Seaman Status

Given that the Jones Act and the LHWCA are mutually exclusive, the issue arises whether plaintiff's receipt of benefits under the LHWCA precludes him from being a seaman under the Jones Act.[5]

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4. The negligence issue will therefore be decided under the Jones Act, which applies a standard more favorable to the claimant, *see Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511(1957) (the defendant is liable if "even the slightest" negligence on the defendant's part caused the claimant's injury), and is a question for the jury to decide. *See id.* at 523-24, 77 S.Ct. at 458.

5. We take judicial notice of the August 27, 1992, Decision and Order of the ALJ. Defendant has supplied us with a copy and requests that we take judicial notice of said ruling pursuant to Rule 201 of the Federal Rules of Evidence. Although plaintiff disputes the propriety of taking judicial notice, he does not dispute that the ALJ issued the August 27, 1992, Decision and Order in his LHWCA compensation claim case and that the document supplied by defendant is a true copy thereof. Rule 201 provides for judicial notice of adjudicative facts that are, *inter alia*, "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Such "[j]udicial notice may be taken at any stage of the proceeding," (Rule 201(f)) including on appeal (*United States v. Gonzalez*, 442 F.2d 698, 707 (2d Cir. 1970). certiorari denied 404 U.S. 845, 92 S.Ct. 146. 30 LEd.2d 81 (1971); *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1403 n. 2 (9th Cir.1989), certiorari denied, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990); *Bryant v. Carleson*, 444 F.2d 353, 357-8 (9th Cir.), certiorari denied 404 U.S. 967, 92 S.Ct. 344, 30 L.Ed.2d 287 (1971)); and is mandatory "if requested by a party and [the court is] supplied with the necessary information." Rule 201(d).

(Cont'd)

> It is by now 'universally accepted' that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act. [Citations omitted.]

Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 90-92, 112 S.Ct. 486, 493-94.

The distinction between *Gizoni* and the case at bar is that here plaintiff's LHWCA claim was fully adjudicated before the ALJ who rendered a final decision. That the LHWCA claim was never actually litigated was the basis for the *Gizoni* Court's holding that receipt of LHWCA benefits did not automatically preclude subsequent litigation under the Jones Act. However, the Court went on to recognize further support for its holding, which is applicable here: "Moreover, the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA" *Id.*, at 91-92, 112

(Cont'd)

Judicial notice is properly taken of orders and decisions made by other courts or administrative agencies. *Bryant v. Carleson, supra; Assembly of State of California v. U.S. Department of Commerce*, 797 F.Supp. 1554, 1558-59 (E.D.Cal.), affirmed 968 F.2d 916 (9th Cir.1992); *Missouri Pacific Railroad Company v. United Transportation Union, General Committee of Adjustment*, 580 F.Supp. 1490 (E.D.Mo.1984), affirmed 782 F.2d 107 (8th Cir. 1986), certiorari denied 482 U.S. 927, 107 S.Ct. 3209, 96 L.Ed.2d 696 (1987).

Plaintiffs request for an opportunity to be heard on the propriety of taking judicial notice pursuant to Rule 201(e) has been sufficiently satisfied in that he has had the opportunity to address the matter in his reply brief and at oral argument.

S.Ct. at 494. The Supreme Court further stated in a footnote addressing an equitable estoppel argument made by an amicus brief, "[w]here full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear. [Citations omitted.] Argument by amicus would force injured maritime workers to an election of remedies we do not believe Congress to have intended." *Id.*, at 92, n. 5, 112 S.Ct. at 494, n. 5.

In determining whether the prior litigation of plaintiff's LHWCA claim bars his subsequent Jones Act claim, we are mindful of the reasoning expressed by the *Gizoni* Court and are further concerned with the fairness in imposing such a bar where it could work a disincentive on the part of the employer to vigorously litigate its defense in the LHWCA action. This is so because the parties are on the opposite sides of the seaman issue under the LHWCA as compared with their positions under the Jones Act. Futhermore, imposing such a bar would result in subjecting to suit an employer who immediately and voluntarily begins compensation payments while immunizing from suit an employer who forces his employee to seek compensation through litigation.

As was recognized in *The Law of Admiralty*,

> The provision of compensation during [the] period [a Jones Act action is pending,] would serve the function of the traditional maritime remedy of maintenance and cure (which has always been thought of as supplemental to the damage recovery). It is only because of a series of accidents in our legal history that the payment of medical expenses and a

> living allowance to an injured worker is thought to be entirely consistent with his damage recovery if the payment is called maintenance and cure but inconsistent with the damage recovery if it is called compensation.

Grant Gilmore & Charles L. Black Jr., *The Law of Admiralty* 435 (2d ed. 1975).

Recognizing that a bar to relitigation would not serve the purpose for which it is usually employed since the parties are forced to take inconsistent positions under the Jones Act and the LHWCA and extending the reasoning of the *Gizoni* Court to the next logical step, we hold that plaintiff's litigation of his LHWCA claim does not bar his subsequent Jones Act claim.[6]

IV. CONCLUSION

Granting summary judgment on plaintiff's Jones Act claim was error. The determination of seaman status under the Jones Act involves consideration of both the duration and nature of the plaintiff's connection to the vessel, which necessitates an inquiry into all of the facts surrounding the plaintiff's employment. Furthermore, plaintiff's pursuit of his compensation claim under the LHWCA does not render his Jones Act claim moot. Accordingly, the grant of partial summary judgment on plaintiff's Jones Act claim is reversed and this matter is remanded for further proceedings consistent herewith.

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6. *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir.1995), which involved a maritime worker whose LHWCA claim was compromised and settled before a Jones Act action was filed, reached he same result for different reasons.

POOLE, Circuit Judge, dissenting:

Because I cannot agree with my colleagues' construction of *Chandris, Inc. v. Latsis*, __ U.S. __, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995), as it applies to this case, I respectfully dissent.

This case hinges on the construction of the "connection to a vessel" requirement for defining seamen under the Jones Act. We are blessed to have as an aid a recent Delphic pronouncement, the Supreme Court's decision in *Chandris*. As the majority reads *Chandris*, "[t]he proper inquiry is whether plaintiff's relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment." *See supra* at 206. So far, so good. We agree over what *relationhsip* a seaman must have — a relationship substantial in both duration and nature.

But with what must a seaman have that relationship? It is here I believe my colleagues have sailed off course. Relying on *Chandris*, the majority concludes that "it may be necessary to examine the work performed by the employee while employed by different employers during the relevant time period." *See supra* at 206. In one stroke, perhaps without even fully realizing it, the majority vitiates the "connection to a vessel" requirement.

I

The line between LHWCA coverage and Jones Act coverage recognizes "the fundamental distinction between land-based and sea-based maritime employees." *Chandris*, __ U.S. at __, 115 S.Ct. at 2185. "The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347, 111 S.Ct.

807, 813,112 L.Ed.2d 866 (1991). While all those who do the ship's work are eligible for seaman's status, the vessel connection requirement serves the critical function of "separat[ing] the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Chandris*, __U.S. at __, 115 S.Ct. at 2190.

It is not necessary that a seaman have allegiance only to a single vessel. Thirty-five years ago, the Fifth Circuit, the leading circuit on admiralty law, recognized that the Jones Act could still apply to a maritime worker who was " 'assigned permanently to' several specific vessels 'or perform(s) a substantial part of his work on the' several specified 'vessel(s).' " *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 528 (5th Cir.1960) (quoting *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir.1959)). "Under the fleet doctrine, one can acquire 'seaman' status through permanent assignment to a group of vessels under common ownership or control." *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138, 1141 (9th Cir.1995). The Fifth Circuit's "fleet doctrine" is now the law of this circuit; we recently expressly adopted it in *Gizoni*. *Id.*

In my view, *Chandris* approves of and adopts the fleet doctrine as well. After canvassing the circuit courts' law and discussing the fleet doctrine with approval, __ U.S. at __, 115 S.Ct. at 2189, *Chandris* requires that "a seaman must have a connection to a vessel in navigation (*or to an identifiable group of such vessels*) . . ." __ U.S. __, 115 S.Ct. at 2190 (emphasis added). This is exactly how the Fifth Circuit has phrased the doctrine: "The key is that there must be a relationship between

the claimant and a specific vessel or identifiable group of vessels." *Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir.1981). Thus, according to the Supreme Court, a seaman need not owe allegiance to a single vessel; it is enough that he is substantially connected to "an identifiable group." Although *Gizoni* did not use the precise "identifiable group" language in adopting the Fifth Circuit's fleet doctrine, it presumably incorporated the same concepts. *See Gizoni*, 56 F.3d at 1141 (interpreting fleet doctrine as requiring permanent assignment to a group of vessels under common ownership or control, and citing several Fifth Circuit cases with approval).

In the majority's view, however, that group may be identified simply as those vessels on which a sailor sails, not just those of a particular employer or controlling entity. *See supra* at 206 ("[A]ll the circumstances surrounding the work performed by plaintiff for defendant . . . as well as work performed for other employers during the relevant time should be considered in making the [seaman] determination."). This renders the "identifiable group" or "fleet" requirement a nullity. The majority's position has been expressly rejected by each of the other circuits which have adopted the fleet doctrine:

> By fleet we mean an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated.

Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir.1986) (en banc) (footnote omitted); *accord Bach v. Trident Steamship Co.*, 920 F.2d 322, 324 (5th Cir.), *vacated and remanded*, 500 U.S. 949, 111 S.Ct. 2253, 114 L.Ed.2d 706 *reaff'd on remand*, 947 F.2d 1290 (5th Cir.1991).

> The key to the Fleet Seaman Doctrine is that the seaman maintain the employment relationship with the same employer. The term 'fleet' refers to the fleet of vessels owned by the employer, not the fleet of vessels on which the employee has worked.

Reeves v. Mobile Dredging & Pumping Co., 26 F.3d 1247, 1256 (3d Cir.1994).[1]

What inspires this departure? The following language from *Chandris*, which elsewhere clearly endorses the fleet doctrine: "On the other hand, we see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer." __ U.S. at __, 115 S.Ct. at 2191. But as that opinion's subsequent discussion makes clear, the emphasis in this statement is on the words "overall course," not "particular employer." *Chandris* goes on to discuss the fact that it may sometimes be necessary to judge connection based not on the

1. Moreover, our recent decision in *Gizoni* cites with approval the Fifth Circuit's description of its fleet doctrine in *Campo v. Electro-Coal Transfer Corp.*, 970 F.2d 51, 52 (5th Cir.1992). *Gizoni*, 56 F.3d at 1141. In explaining the fleet doctrine, *Campo* expressly rejects the approach the majority takes today. *Campo*, 970 F.2d at 52 (" 'We reject the notion that [a] fleet of vessels in this context means any group of vessels an employee happens to work aboard.' " (quoting *Barrett*, 781 F.2d at 1074)).

overall course of an employee's work with an employer, but based only on her latest or current assignment with that employer. *Id.* at __ - __, 115 S.Ct. at 2191-92.

In short, nothing in *Chandris'* language permits us to abandon the requirement that a Jones Act seaman be substantially connected to, at the least, "an identifiable group" of vessels. *Id.* at __, 115 S.Ct. at 2190. By so doing, we "totally obliterate[ ]" "the fundamental distinction between members of a crew and transitory maritime workers." *Barnett*, 781 F.2d at 1074.

II

Applying the proper fleet requirement, I cannot agree that the district court erred in granting summary judgment on Papai's Jones Act claim. The district court did not explain its reasoning, but in my view, the ALJ who decided Papai's LHWCA claim had it right:

> Although some of the work performed by the claimant is the type of work that might be performed by a member of a ship's crew, the evidence also clearly indicates that at the time of the claimant's injury he was a "land-based" worker and therefore is entitled to seek a remedy for his injury under the Longshore Act [and prohibited from seeking a remedy under the Jones Act]. For example, the claimant's testimony indicates that all of his jobs were obtained by going to a union hiring hall on a daily basis and waiting to be assigned work according to seniority. Tr. at

33. The claimant's testimony also indicates that none of his jobs lasted more than two or three days at a time, and that, as a result, he had a variety of different employers and worked on a variety of different ships. Tr. at 32, 33 and CX 16-18. Since the claimant was not assigned to work on any particular ship, he lived on the shore, not on a ship. Tr. at 33. Although the claimant had worked aboard the *P.T. Barrow* before the date on which he was injured, the job the claimant was performing at the time of his injury was of only one day's duration. Tr. at 31, 66. It is obvious from these facts that the claimant's assignment to any particular vessel or fleet of vessels was random, sporadic and transitory. Given this lack of any permanent connection to any vessel or fleet of vessels, it necessarily follows that the claimant cannot be considered as a member of the crew of any ship or fleet of ships [and thus, not a seaman].

ALJ 8/27/92 Order at 5. Seaman's status is a mixed question of law and fact, but "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Wilander,* 498 U.S. at 356, 111 S.Ct. at 818. This is such a case. Because Papai's contact with any vessel or vessels could only be described as "transitory or sporadic," *Chandris,* __ U.S. at __, 115 S.Ct. at 2190, the district court correctly determined that Papai was not a seaman as a matter of law.

As the Supreme Court has explained, "Traditional seaman's

remedies . . . have been 'universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to the sea in ships are subjected.'. . . . It is this distinction that Congress recognized in the LHWCA and the Jones Act." *Wilander,* 498 U.S. at 354, 111 S.Ct. at 817 (quoting *Seas Shipping Co. v. Sieracki,* 328 U.S. 85,104, 66 S.Ct. 872, 882, 90 L.Ed. 1099 (1946) (Stone, C.J., dissenting)). John Papai, who woke up in his own bed, arrived at the hiring hall to learn he was to paint the *Point Barrow* for a day, and was back in his own bed by night, cannot seriously be described as having that "peculiar relationship" with the *Point Barrow* or Harbor Tug's fleet so as to be entitled to Jones Act protection. Because the majority believes that peculiar relationship to be no longer required, I respectfully dissent.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 12, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-15132
D.C. No. C-90-0111 CAL

JOHN PAPAI, JOANNA PAPAI

Plaintiffs-Appellants,

v.

HARBOR TUG AND BARGE COMPANY,

Defendant-Appellee.

ORDER

Before: POOLE, REINHARDT, Circuit Judges, and TAKASUGI.[1]

Judges Reinhardt and Takasugi have voted to deny the petition for rehearing. Judge Poole voted to grant the petition for rehearing. Judges Poole and Reinhardt have voted to reject the suggestion for rehearing en banc, and Judge Takasugi so recommends. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a

1. Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA FILED MAY 29, 1990

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-90-0111 CAL

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT TO DEFENDANT
HARBOR TUG AND BARGE COMPANY

Date: May 18, 1990
Time: 9:30 a.m.

Courtroom: Judge Legge

JOHN PAPAI, JOANNA PAPAI,

Plaintiffs,

vs.

HARBOR TUG AND BARGE COMPANY,

Defendant.

Appendix C

Defendant HARBOR TUG AND BARGE COMPANY (HTB) filed a Motion for partial summary judgment that plaintiff JOHN PAPAI was not a "seaman" at the time of his accident and that therefore Plaintiffs cannot assert a cause of action against HTB under the Jones Act, 46 U.S.C. § 688, or under the general maritime law. Each party submitted Points and Authorities in connection with the motion. Oral argument on the motion was heard on May 18, 1990. Tom Boyle appeared for Plaintiffs, and Eric Danoff of Graham & James appeared for Defendant.

The Court, having considered all the papers submitted by the parties, as well as the oral argument presented at the hearing, finds that at the time of his accident plaintiff John Papai was not a seaman within the meaning of the Jones Act or the general maritime law, and that therefore Plaintiffs cannot assert a cause of action against defendant Harbor Tug and Barge Company under the Jones Act or under the general maritime law for damages or for maintenance and cure.

IT IS THEREFORE ORDERED that Plaintiffs' causes of action under the Jones Act and the general maritime law are dismissed with prejudice. This Order does not affect the causes of action, if any, that Plaintiffs may have under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et.seq.*, or for common law negligence. Plaintiffs are granted time through May 31, 1990, to amend their Complaint to allege such causes of action.

It is also ordered that a status conference in this case take place on June 8, 1990, at 11:00 a.m.

Dated: May 29, 1990.

CHARLES A. LEGGE
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHEN DISTRICT OF CALIFORNIA FILED AUGUST 21, 1990

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-90 0111 CAL

ORDER OF DENIAL OF RECONSIDERATION AND STATEMENT OF GROUNDS FOR IMMEDIATE APPEAL 28 U.S.C. §1292(b)

JOHN PAPAI, JOANNA PAPAI,

Plaintiffs,

v.

HARBOR TUG & BARGE CO., et al.,

Defendants.

Plaintiffs filed a motion for reconsideration of this Court's order of May 29, 1990, that their causes of action under the Jones'

Act and the general maritime law be dismissed. Oral argument on the motion was heard on August 3, 1990. Thomas Boyle appeared for the plaintiffs, and Eric Danoff of Graham and James appeared for defendant.

The Court remains convinced that plaintiff John Papai was not a seaman within the meaning of the Jones Act at the time of his injury.

IT IS THEREFORE ORDERED that the motion for reconsideration is denied and that plaintiffs causes of action under the Jones' Act and the general maritime law remain dismissed with prejudice.

The undersigned is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order as authorized by 28 U.S.C. §1292(b) may materially advance the ultimate termination of this litigation.

IT IS THEREFORE ORDERED that all proceedings herein be stayed for ten days from date of entry of this order. If, within such ten days, plaintiffs shall apply to the united States Court of Appeals for the Ninth Circuit for permission to appeal from this order, the proceedings herein shall be stayed pending determination of such application, or of the appeal, if it is allowed.

Dated: August 17, 1990.

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED APRIL 6, 1992

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-90-0111 CAL

ORDER CONFIRMING SUMMARY ADJUDICATION THAT PLAINTIFF JOHN PAPAI WAS NOT A SEAMAN

Date: March 27, 1992
Time: 9:30 a.m.
Courtroom: Judge Legge

JOHN PAPAI, JOANNA PAPAI,

Plaintiffs,

v.

HARBOR TUG AND BARGE COMPANY,

Defendant.

Appendix E

Defendant HARBOR TUG AND BARGE COMPANY ("HTB") has filed a motion to confirm the Court's prior summary adjudication that at the time of his accident plaintiff JOHN PAPAI was not a "seaman" within the meaning of the Jones Act or the general maritime law. Each party submitted Points and Authorities in connection with the motion. Oral argument on the motion was heard on March 27, 1992.

The Court, having considered all the papers submitted by the parties, as well as the oral argument presented at the hearing, confirms its prior finding upon summary adjudication that, at the time of the accident in issue, plaintiff John Papai was not a seaman within the meaning of the Jones Act or the general maritime law, since he did not have a "more or less permanent connection" with the vessel on which he was injured nor did he perform substantial work on the vessel sufficient for seaman status.

DATED: APR -6 1992

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED DECEMBER 28, 1992

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-90-0111 CAL

JUDGMENT IN FAVOR OF DEFENDANT
HARBOR TUG AND BARGE COMPANY

JOHN PAPAI, JOANNA PAPAI,

Plaintiff,

vs.

HARBOR TUG AND BARGE COMPANY,

Defendant.

ENTERED IN CIVIL DOCKET 12/29, 1992

This action came on for trial to the Court, Judge Charles A. Legge presiding, during the period August 31, 1992 through

Appendix F

September 17, 1992. The Court has heard the oral evidence and has reviewed the documentary evidence admitted at the trial, has read the pre-trial and post-trial briefs, and has heard the oral arguments of counsel presented on December 16, 1992. The Court having considered all the foregoing, and for the reasons stated on the record in open court on December 16, 1992:

IT IS HEREBY ORDERED that Judgment be entered in favor of defendant Harbor Tug and Barge Company and against plaintiffs John Papai and Joanna Papai. Plaintiffs' First Amended Complaint is to be dismissed with prejudice. Defendant Harbor Tug and Barge Company is awarded costs of suit.

Dated: 12/28, 1992

s/ Charles A. Legge
Charles A. Legge
U.S. District Judge

APPENDIX G — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF LABOR DATED AUGUST 27, 1992

U.S. Department of Labor

Office of Administrative Law
211 Main Street — Suite 600
San Francisco, California 94105

Commercial (415) 744-6577
FAX (415) 744-6569
FTS 8 (415) 744-6577

CASE NO. 92-LHC-403

OWCP NO. 13-85230

In the Matter of

JOHN PAPAI,

Claimant,

v.

HARBOR TUG AND BARGE,

Employer,

and

CRAWFORD & COMPANY,

Insurer,

Appendix G

and

DIRECTOR, OWCP,

Party in Interest

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For the Claimant

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For the Employer/Insurer

George B. O'Haver, Esq.
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71 Stevenson Street
San Francisco, California 94105

For the Director, OWCP

Before: Paul A. Mapes

Administrative Law Judge

Appendix G

DECISION AND ORDER — AWARDING BENEFITS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter, the "Act" or the "Longshore Act"), 33 U.S.C. §901 *et seq*. A formal hearing was held in San Francisco, California, on June 2, 1992. Counsel for the claimant and counsel for the employer/carrier appeared at the hearing and the following exhibits were admitted into evidence: Claimant's Exhibits (CX) 1-6, and Employer/Carrier Exhibits (EX) 1-20. Counsel for the Director, OWCP, did not appear at the hearing, but did submit a pre-hearing statement. Following the hearing, the deposition of Dr. Scott F. Dye was admitted as Claimant's Exhibit 7. Counsel for both the claimant and the employer/carrier submitted post-hearing briefs.

BACKGROUND

The claimant, John Papai, was born on January 5, 1947. He has a high school education, some college-level training, and work experience as a mail clerk (1965-68), bartender (1971-86), and deck hand (1986-89). CX 5 at 118. On March 13, 1989, while employed by Harbor Tug and Barge to do painting work board the tugboat *P. T. Barrow*, the claimant fell from a ladder and severely injured his left knee. The claimant was later examined by Dr. Scott F. Dye, who performed surgery on the knee on May 17, 1989. CX 3 at 46. Dr. Dye described the surgery as an "arthroscopic partial lateral medial meniscectomy followed by chondroplasty of the medial femoral condyle, partial arthroscopic synovectomy and an anterior cruciate ligament reconstruction utilizing the central third of the patellar tendon." *Id*. According to Dr. Dye, the claimant's knee did not become permanent and stationary until February 5, 1990, at which time

Appendix G

Dr. Dye also determined that the claimant could not return to his job as a deck hand.[1] CX 3 at 54. In May of 1991 the claimant was again seen by Dr. Dye, at which time the claimant reported intermittent discomfort in his right hip after prolonged standing. CX 3 at 52. The claimant also reported pain in his back and hip to Dr. Dye in July, August, September, and December of 1991. CX 3, 7. According to Dr. Dye, the most probable cause of the hip and back pain described by the claimant is a modification of the claimant's gait which is in turn due to the injury to the claimant's left knee. CX 7 at 16, 21-23.

After it was determined that the claimant was permanently disabled from performing his past work as a deck hand, he was referred to Emily Tincher for vocational rehabilitation. Ms. Tincher first met with the claimant on August 6, 1990, and at that time the claimant expressed an interest in being retrained as an artist. CX 5 at 119. Ms. Tincher again met with the claimant on November 1, 1990, and arranged for him to have an "interview for informational purposes" with an engraving company located in San Francisco. CX 3 at 80. One of Ms. Tincher's reports indicates that on November 9, 1990, the claimant informed her that he had refused a $9.00 per hour job with the engraving company, an allegation that was denied by the claimant during the hearing. CX 3 at 81 and Tr. at 58. Following the interview at the engraving company, Ms. Tincher and the claimant decided

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1. During September 1989 the claimant's left knee buckled as he was going down some stairs, and, as a result, the claimant fell and fractured a bone in his right foot. Tr. at 45. The fracture was surgically corrected and the claimant's right foot was in a cast for six to eight weeks. Tr. at 46-47. The claimant testified that he was having no significant problems with his right foot by the time that his knee was found to be permanent and stationary in February of 1990, and that he has not any problems with the foot since then. Tr. at 48.

that the claimant would attend a three-semester graphic arts training program at San Francisco City College. However, due to a dispute over the claimants need to take a cab to and from classes, the claimant was not able to enroll in classes until the summer semester of 1990. CX 3 at 100, 86, 77. The claimant testified during the hearing that he had recently completed the third semester of the program and had received either A's or B's in all of his courses. Tr. at 59-63. As of the date of the hearing the claimant had not been employed since his initial injury on March 13, 1989. The parties stipulated that between the date of the initial injury and the date of the hearing the claimant had been paid weekly disability benefits of $238.46. Tr. at 8, 9.

ANALYSIS

The evidence in the record clearly shows that the injury to the claimants left knee on March 13, 1989, arose in the course of and out of the claimant's employment on the navigable waters of the United States. As well, it is undisputed that the claimant earned a total of $18,598.88 in the year preceding the injury. There are disputes in this case, however, concerning the following issues: (1) jurisdiction under the Longshore Act, (2) the claimant's average weekly wage, (3) the period of total disability, (4) the nature and extent of any permanent partial disability, and (5) the employers entitlement to relief under the provisions of subsection 8(f) of the Act.

1. Jurisdiction

The employer in effect concedes that the claimant's injury occurred on the navigable waters of the United States and arose out of and in the course of the claimant's employment. The employer argues, however, that at the time of his injury the

claimant may have been a Jones Act seaman and that, if so, jurisdiction under the Longshore Act is barred in this case by the provisions of subsection 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), which excludes from the Acts jurisdiction "a master or member of a crew of any vessel." Thus, the employer further contends, if the claimant was in fact a seaman at the time of his injury the only remedy for his injury is under the provisions of the Jones Act, 46 U.S.C. App. §688.[2]

In *McDermott International, Inc. v. Wilander*, __ U.S. __, 111 S. Ct. 807 (1991), the Supreme Court clarified the standard for determining whether a particular claimant's remedy is under the Jones Act or the Longshore Act. According to the Court's decision, the Longshore Act "is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees" and only the Longshore Act

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2. It is noted in this regard that the claimant has filed a civil complaint against the employer in the United States District Court for the Northern District of California alleging that when he received the injury at issue in this case he was a seaman entitled to seek damages under the provisions of the Jones Act, 46 U.S.C. App. §688. The employer has responded to that complaint by alleging that the claimant was not a Jones Act seaman at the time of the injury. Since anyone who is a seaman for purposes of the Jones Act falls within the scope of the subsection 2(3)(G) exclusion from Longshore Act jurisdiction, the positions of both the claimant and the employer in the Jones Act case are necessarily in direct conflict with their positions in this case. Counsel for the employer has provided copies of orders of the District Court granting the employer's motion for summary judgment on the claimants Jones Act case on the grounds that the claimant was not a Jones Act seaman at the time of his injury. Since the District Court case also involves a claim under subsection 5(b) of the Longshore Act, 33 U.S.C. §905(b), these orders granting summary judgment are interlocutory in nature and therefore cannot be invoked in this case for purposes of applying the doctrines of *res judicata* or collateral estoppel.

applies to land-based workers. 111 S. Ct. 807, 814, 817. The Court further held that in making the distinction between land-based and sea-based employees, "[i]t is not the employee's particular job that is determinative, but the employee's connection to a vessel." 111 S. Ct. 807, 817. The Court's decision cited with approval the Fifth Circuit's decision in *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), which established a two-part test for determining crew member status. Under this test, an employee is a member of a crew if: (1) he was permanently assigned or performed a substantial part of his work on a vessel or fleet of vessels, and (2) his duties contributed to the vessel's function or operation.[3]

The claimant has described his maritime employment as "mostly deck hand work . . . casting off boats and landing boats." Tr. at 33. The resume prepared for him by the vocational rehabilitation specialist states that the claimant's work primarily involved ferry boats and tug boats and indicates that he handled lines used in mooring vessels and well as lines used for towing and for tying vessels to each other. CX 5 at 118. In addition, the claimant's work involved painting vessels, lubricating machinery, and repairing ropes and cables. *Id.* On the day the claimant was injured, his duties consisted of painting various parts of the a tug boat that was docketed at port facilities in Alameda, California. Tr. at 30-32.

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3. In *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 395 (9th Cir. 1973), the Ninth Circuit adopted a standard that required a claimant under the Jones Act to show that (1) the vessel on which he was employed was in navigation, (2) he had a more or less permanent connection with the vessel, and (3) he was aboard the vessel primarily to aid in navigation. The third prong of this test was in effect reversed by the Supreme Court's decision in *Wilander*.

Although some of the work performed by the claimant is the type of work that might be performed by a member of a ship's crew, the evidence also clearly indicates that at the time of the claimant's injury he was a "land-based" worker and therefore is entitled to seek a remedy for his injury under the Longshore Act. For example, the claimant's testimony indicates that all of his jobs were obtained by going to a union hiring hall on a daily basis and waiting to be assigned work according to seniority. Tr. at 33. The claimant's testimony also indicates that none of his jobs lasted more than two or three days at a time, and that, as a result, he had a variety of different employers and worked on a variety of different ships. Tr. at 32, 33 and CX 16-18. Since the claimant was not assigned to work on any particular ship, he lived on the shore, not on a ship. Tr. at 33. Although the claimant had worked aboard the *P.T. Barrow* before the date on which he was injured, the job the claimant was performing at the time of his injury was of only one day's duration. Tr. at 31, 66. It is obvious from these facts that the claimant's assignment to any particular vessel or fleet of vessels was random, sporadic and transitory. Given this lack of any permanent connection to any vessel or fleet of vessels, it necessarily follows that the claimant cannot be regarded as a member of the crew of any ship or fleet of ships. *See Griffin v. T. Smith & Son Inc.*, 25 BRBS 196 (1991). Accordingly, I find that the claimant's claim is not barred by the provisions of subsection 2(3)(G) of the Act, and that the claim is in all other respects within the jurisdiction of the Longshore Act.

2. Average Weekly Wage

The claimant does not dispute the employer's evidence indicating that in the year preceding the injury he earned $18,598.88, a level of earnings that results in a weekly compensation rate of $238.46. However, the claimant asserts

that his average weekly wage and compensation rate should be adjusted upward to account for the fact that if he had been able to continue working after the accident, he would moved into a higher union seniority category and therefore would have had a higher income.

A claimants average weekly wage is determined by utilizing one of three methods set forth in section 10 of the Act. 33 U.S.C. §910. Subsection 10(a) applies when a claimant worked in the same employment for substantially the whole of the year immediately preceding the injury. Subsection 10(b) applies when the claimant was not employed substantially the whole year preceding the injury, but there is evidence in the record of wages of similarly situated employees who have worked substantially the whole year. When neither subsection 10(a) nor 10(b) can reasonably be applied, such as in cases where a claimant's work has been discontinuous and intermittent, subsection 10(c) provides the general method for determining the appropriate average weekly wage. *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). According to the exhibits and testimony in this case, the claimant's employment in the year preceding his injury was clearly discontinuous and intermittent. Accordingly, his average weekly wage must be calculated under the provisions of subsection 10(c).

In calculating an average weekly wage under subsection 10(c), the Act requires consideration of the earnings of the claimant in the job he was performing at the time of the injury, the earnings of other employees, and the wages earned by the claimant in other lines of employment. In addition, it has been held that in determining an average weekly wage under subsection 10(c), it is appropriate in some circumstances to consider wages that a claimant could have earned after the date

of the injury. *Tri-State Terminals Inc. v. Jesse*, 596 F.2d 752 (7th Cir. 1979). In that case, the court upheld a decision of the Benefits Review Board (BRB) that permitted a claimant's average weekly wage to be adjusted upward to account for the fact that following the injury to the claimant (a longshoreman), work opportunities for longshoremen increased substantially. This interpretation of subsection 10(c) has also been adopted in the Ninth Circuit. *Palacios v. Campbell Industries*, 633 F.2d 840 (9th Cir. 1980). In short, under these decisions the claimant would be entitled to have his average weekly wage adjusted upward if he could show that in the time period after his injury he would have had more work opportunities than he had in the period prior to the injury.

In order to show that his earnings would have been greater in the period following his injury than they were before the injury, the claimant testified that at the time of the injury he was close to achieving a higher union seniority level that would have given him more job opportunities. In particular, the claimant testified that when he was injured he needed only 137 more days of work in order to qualify for "B card" seniority status, and stated that with such higher seniority he would have been less subject to seasonal fluctuations in work opportunities for longshoremen. Tr. at 35-39. The claimant also estimated that he would have worked the 137 days needed for B card status by the end of the summer of 1989. Tr. at 38. Claimant's counsel argues that this testimony supports a conclusion that after achieving B card status the claimant would have worked an average of 16.6 days per month year round and therefore would have had an average weekly wage of $576.85, instead of the average weekly wage of $357.69 calculated by the employer.

Although I find that the claimant's average weekly wage

should be adjusted upward if, in fact, he would have had more job opportunities after achieving B card status, I cannot accept the claimant's calculation of the amount that his earnings would have increased. This calculation, which assumes that with a B card the claimant would have been able to work the same number of days each month, is directly contradicted by the claimant's own testimony that even B card holders are subject to seasonal fluctuations, although not as severely as C card holders. Tr. at 39. Moreover, given the lack of any specific evidence concerning actual job opportunities for B card holders, it appears that any attempt to calculate the claimant's probable future earnings would be entirely speculative. Mere speculation is insufficient to justify an increase in a claimant's average weekly wage. *See Todd Shipyards v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976), and *Riddle v. Smith and Kelly Company*, 13 BRBS 416 (1981). Accordingly, it is necessary to find that the claimant has failed to meet his burden of proof on this issue and therefore is not entitled to any upward adjustment in his average weekly wage. Thus, I conclude that the claimant's average weekly wage is $357.69 and that his compensation rate is $238.46 per week.

3. Period of Total Disability

The claimant contends that he has been continuously totally disabled, either temporarily or permanently, since he was injured on March 13, 1989. The employer, on the other hand, contends that the claimant was totally disabled only from the date of his injury until November, 1990, when he was allegedly offered a job by an engraving company. For the reasons set forth below, I agree with the employer and find that the claimant was totally disabled-only until November 12, 1990.

It is well established that once it has been shown that a

claimant cannot return to his past job due to a work-related injury, the employee is presumed to be totally disabled unless the employer is able to successfully demonstrate the existence of suitable alternative employment for the claimant in the geographical area where the claimant resides. *See*, e.g., *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327 (9th Cir. 1980); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). To satisfy its burden of showing suitable alternative employment, the employer must point to *specific* jobs that the claimant can perform. *Bumble Bee*, *supra*, at 1330. In considering whether a claimant has the ability to perform particular work, the fact finder must also consider the claimant's technical and verbal skills, as well as the likelihood, given the claimant's age, education, and background, that the claimant would be hired if he diligently sought the possible job identified by the employer. *Hairston*, *supra*, at 1196, and *Stevens v. Director, OWCP*, 909 F.2d 1256 at 1258 (9th Cir. 1990). If an employer makes the requisite showing of suitable alternative employment, a claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he diligently tried to obtain such work, but was unsuccessful. *See Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991); *Newport News Shipbuilding and Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986); and *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141 (1986).

In this case, there are four distinct periods of time that are of relevance in determining the duration of the claimant's period of total disability. The first relevant period runs from March 13, 1989, when the claimant was inured, until February 5, 1990,

when Dr. Dye determined that the claimant's condition was permanent and stationary and that the claimant was physically incapable of performing his past work. CX 3 at 54. The employer does not dispute the fact that the claimant was temporarily totally disabled during this entire period. Accordingly, I find that the claimant was temporarily totally disabled from March 13, 1989, until February 5, 1990.

The second relevant period runs from February 5, 1990 (when Dr. Dye found the claimant to be permanent and stationary), until November 12, 1990 (when the claimant allegedly could have begun working for a San Francisco engraving company).[4] Although the employer has submitted vocational reports and provided testimony of a vocational expert concerning suitable alternative employment for the claimant, none of this evidence directly shows that any specific employment opportunities were available to the claimant during this particular period. I therefore find that the employer has failed to prove that suitable alternative employment was available to the claimant prior to November 12, 1990, and that the claimant was totally disabled from February 5, 1990, until November 12, 1990.

The third relevant period runs from November 12, 1990, until February 1, 1992, when Dr. Aubrey A. Swartz found that back and hip problems associated with the claimant's knee injury had become permanent and stationary. CX 4 at 64-68. There is a clear dispute between the claimant and the employer concerning the availability of suitable alternative employment during this

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4. The record does not directly indicate the specific date on which the job with the engraving company was available. However, the most likely date appears to be November 12, 1990. *See* CX 5 at 81-84 and Tr. at 58.

period. The employer contends in essence that suitable alternative employment became available to the claimant on November 12, 1990, when the claimant allegedly could have begun working for the engraving company. In contrast, the claimant denies ever receiving such an offer of employment and contends that in any event he would have been unable to perform any work from as early as December 1990 until February 1992 due to back and hip pains that are indirectly attributable to the injury to his left knee.

To resolve this dispute it is first necessary to determine if in fact the job at the engraving company constituted suitable alternative employment for the claimant. In this regard, the record indicates that after participating in the interview with the engraving company the claimant understood what the job required and thought that the job was "OK" for him physically. CX 5 at 81 and Tr. at 82. The record also indicates that the claimant had the technical and verbal skills necessary for the job; indeed, the resume and vocational report that Ms. Tincher sent to the engraving company on the claimant's behalf suggests that the claimant was particularly well suited to the job. CX 5 at 112. Accordingly, the only remaining issue is whether the employer has shown that it was likely that the claimant would have been hired if he diligently sought the job. On this issue I find in favor of the employer. The strongest evidence in favor of the employer on this issue is the statement in Ms. Tincher's November 17, 1990, report that the claimant told her on November 9, 1990, that he had been offered the job and refused it. CX 5 at 81. Although at the hearing the claimant denied receiving or refusing such a job offer, his testimony on this issue was not convincing and is clearly inconsistent with Ms. Tincher's report, which mentions the job offer in two separate passages and indicates that the claimant was concerned that by refusing the job he was

jeopardizing his future vocational rehabilitation. *See* Tr. at 80-86 and CX 5 at 79-82. It is also noteworthy that the claimant himself believes that he had a discussion with Ms. Tincher concerning the consequences of refusing a job offer from the engraving company. Tr. at 83. Ms. Tincher's report also indicates that the claimant stated that he had several reasons for disliking the job and that he was more interested in vocational training than in quickly finding another job. CX 5 at 81-84.[5] Moreover, even if the claimant's testimony that he was not offered a job by the engraving company could be accepted at face value, it would still be necessary to find that it is more likely than not that the claimant would have been offered the job if he deligently sought it. For example, Ms. Tincher's report of November 17, 1990, indicates that on November 8, 1990, an officer of the engraving company told Ms. Tincher that she was "very impressed" with the claimant and would like to interview him again on November 12, if he was still interested in the job.[6] CX 5 at 81.

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5. Claimant's counsel has attempted to discredit Ms. Tincher's report by characterizing it as hearsay. While it is true that the report was prepared out of court and introduced to prove the truth of the matters asserted therein — thereby coming within the traditional definition of hearsay — it is also a document that was obviously prepared in the ordinary course of business and otherwise meets the requirements of the so-called business records exception to the hearsay rule. *See* Federal Rule of Evidence 803(6). Accordingly, this document is entitled to be given probative value. Of course, even if Ms. Tincher's report were not admissible under the Federal Rules of Evidence, it could still be considered in a proceeding under the Longshore Act. 20 C.F.R. §702.339.

6. Although the statements made by the engraving company official in this conversation suggest that the engraving company had not yet in fact formally offered a job to the claimant, it also has to be recognized that the engraving company may have been withholding a formal job offer until it had finalized the 50 percent subsidy for the claimant's starting wages that Ms.

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The claimant has argued that even if he could have obtained the job with the engraving company, he would have been unable to perform it after May 1991 due to hip and back pains associated with his knee injury. The strongest evidence in support of this contention is contained in the reports and deposition testimony of Dr. Dye. In particular, in his deposition testimony Dr. Dye stated that between the time he examined the claimant on May 20, 1991, and December 4, 1991, he considered the claimant to be temporarily totally disabled because treatment of pain the claimant reported in his right hip and back required that the claimant be "in bed most of the day and off his feet most of the time." CX 7 at 20; *see also* CX 7 at 24 and 63.

Although Dr. Dye was the claimant's treating physician and his opinion is entitled to be given substantial weight, Dr. Dye's statement that the claimant's hip and back pain rendered him temporarily totally disabled is inconsistent with much of the other evidence in this record. For example, the report of Dr. Eugene Wolf's examination of the claimant on July 31, 1991, indicates that the claimant described his right hip pain at that time as merely a burning sensation and his back pain as a dull ache. Dr. Wolf apparently did not believe that the claimant's hip and back pain warranted any change from the conclusions Dr. Wolf reached following his evaluation of the claimant on March 8, 1990. In addition, Dr. Wolf described the claimant's back pains as of no "significant consequence." EX 5 at 351-52. Likewise, when Dr. Swartz examined the claimant on February 1, 1992, he

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Tincher had offered to provide in her letter to the company of November 2, 1990. CX 5 at 112. This offer of a 50 percent wage subsidy is also another factor that suggests that the claimant would have been hired for this job if he had diligently sought it.

described the claimant's back pain as being "slight" except when the claimant engaged in repetitive bending or heavy lifting, in which case Dr. Swartz described the pain as "moderate." Dr. Swartz also characterized the claimant's hip pain as "slight." CX 4 at 66. Neither Dr. Wolf or Dr. Swartz suggested that the claimant needed any periods of bed rest in order to treat these conditions. Similarly, at the hearing Dr. Walter Indeck testified that Dr. Dye's treatment of the claimant's hip and back complaints was not consistent with a significant medical problem. Tr. at 145-46. Dr. Indeck also noted that Dr. Dye's reports during this period do not state that the claimant was temporarily totally disabled. Tr. at 146. Dr. Indeck's testimony and the other evidence in the record also indicate that the claimant did not follow up on Dr. Dye's recommendation that he consult another physician concerning his hip pain, a failure that suggests that the claimant's hip pain was not a serious problem for him. Tr. at 183-84. Most significantly, the claimant's own activities between May 1991 and February 1992 suggest that he was not totally disabled during this period. For example, the claimant testified that he began attending San Francisco Community College in the summer of 1991 and missed only three classes because he had "a cold or something." Tr at 59-61, 78. Likewise, the claimant testified that he took four courses in the fall of 1991 and had no attendance problems. Tr. at 61. It is also highly significant that although the claimant asserts that he was not capable of returning to light duty work in October 1991, the claimant's wife contacted Ms. Tincher during that same month and asked her to see if there was any light work the claimant could do. Tr. at 78.

In view of the substantial amount of evidence indicating that the claimant's back and hip pain were not in fact significantly disabling between May 1991 and February 1992, I cannot accept

Dr. Dye's opinion that the claimant was temporarily totally disabled during this period. Rather, I find that the claimant has failed to demonstrate that he could not have performed the engraving company job that, as I have already found, became available to him in November 1990.

The fourth relevant period of possible total disability runs from February 1, 1992, until the present. The employer has presented vocational testimony and reports indicating that the claimant could have been employed in various jobs during this period, and the claimant has presented conflicting vocational evidence. It is not necessary, however, to resolve the conflicts between the vocational experts. As previously noted, suitable alternative employment was available to the claimant in November 1990, which he has been found capable of performing from November 1990 until February 1992. Nothing in the record suggests that the claimant was any less capable of performing such work between February 1992 and the present.

In sum, I find that the claimant was totally disabled from March 13, 1989, until November 12, 1990, when suitable alternative employment became available to him.

4. Nature and Extent of Any Permanent Partial Disability

The evidence shows that the claimant's March 13, 1989, injury has affected four parts of his body: (1) his left knee, (2) his right foot, (3) his right hip, and (4) his back.

Left Knee. There is no dispute that the claimant directly injured his left knee in the March 13, 1989, accident, and that as a result of this injury the claimant is permanently unable to do his past work as a deck hand. It is also clear that the claimant's left

knee has been permanent and stationary since February 5, 1990. Since a knee injury is considered to be a scheduled impairment, subsections 8(c)(2) and 8(c)(19) of the Longshore Act govern the calculation of the benefits for this injury. Under these subsections a worker who suffers a knee injury is entitled to that portion of 288 weeks compensation that is equal to the percentage of use of the worker's leg that has been lost. The claimant contends that in this case the appropriate percentage figure is 45 percent. In contrast, the employer argues that the appropriate figure is 30 percent.

Significantly, all three of the physicians who have rated the claimant's knee injury under the AMA guidelines have arrived at the same percentage disability: 30 percent. See EX 7 (Dr. Indeck), EX 4 (Dr. Wolf), and CX 4 (Dr. Swartz). The claimant notes, however, that Dr. Indeck and Dr. Wolf assigned different weights to different factors in arriving at their total disability ratings of 30 percent and contends that a total disability rating of 45 percent can be achieved by adding together those separate portions of Dr. Wolf's and Dr. Indeck's ratings that are most favorable to the claimant. Although the claimant's argument is ingenious, it is not persuasive enough to overcome the substantial weight that must be given to the fact that all three of the physicians who rated the claimant's knee, including one apparently retained by the claimant, have arrived at identical disability ratings.[7] Accordingly, I find that the claimant has lost 30 percent of the use of his left leg and is therefore entitled to receive permanent partial disability benefits equal to 30

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7. It is also noted that at least two of the physicians considered pain in determining a rating for the claimant's knee. *See* Tr. at 175 (testimony of Dr. Indeck) and CX 4 at 69 (report of Dr. Swartz).

percent of 288 weeks compensation, i.e., 86.4 weeks compensation.[8]

Right Foot. As previously noted, the claimant's right foot was broken as an indirect result of the claimant's left knee injury. Consequently, the injury to the right foot is a compensable injury. *See Cyr v. Crescent Wharf and Warehouse Co.*, 211 F.2d 454 (9th Cir 1954). It is clear from the medical evidence and the claimant's testimony that the claimant's right foot is now permanent and stationary. Since injuries to a worker's foot are considered to be scheduled injuries, the determination of benefits for this injury is governed by the provisions of subsections 8(c)(3), (c)(4), and (c)(19) of the Act. The only medical evidence in the record quantifying the loss of use of the claimant's right foot is the February 1, 1992, report of Dr. Swartz. CX 4 at 64. Although Dr. Swartz has represented that the injury to the claimant's right foot does not meet the criteria for percentage loss calculations (CX 4 at 69), the claimant argues that the measurements made by Dr. Swartz concerning the range of motion of the claimant's right ankle and subtalar joint actually show a 12 percent loss of use of the claimant's right leg under the AMA's Guide to the Evaluation of Permanent Disabilities, revised third edition. I agree with the claimant's argument that Dr. Swartz was in error when he represented that the injury to the claimant's right foot is not ratable under the AMA guidelines. Comparison of Dr. Swartz's measurements against the AMA guidelines clearly indicates that there has been a ratable loss of

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8. It is noted that some of the loss of use of the claimant's left knee may be attributable to an injury suffered by the claimant while he was in high school. However, even if this were the case, it would not reduce the employer's liability for the entire 30 percent loss of use. *See Strachen Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

use in the claimant's right foot. However, according to the guidelines for rating foot injuries the claimant has suffered only a seven percent loss of use (two percent loss of use for restricted plantar-flexion, three percent loss of use for restricted inversion, two percent loss of use for restricted eversion and no loss of use for restricted dorsi-flexion).[9] Accordingly, I find that the claimant has lost seven percent of the use of his right leg and is therefore entitled to receive permanent partial disability benefits equal to seven percent of 288 weeks compensation, i.e., 20.16 weeks compensation.

Right Hip. The claimant contends that the injury to his left knee has altered his gait and that as a result he suffers pain in his right hip. At the hearing the claimant described the pain in his hip as a continuing "dull ache" and stated that he also has a burning sensation running from his right hip to his knee. Tr. at 50. The reports of two physicians contain similar descriptions. EX 5 at 351-52 and CX 4 at 66. Although the employer apparently does not dispute the fact that an altered gait can produce hip pain, the employer does dispute the contention that the claimant's gait has been materially altered as a result of his knee injury. Moreover, the employer suggests that the claimant may well have fabricated complaints of hip and back pain in order to increase his disability benefits.

There is a variety of medical evidence concerning a possible alteration of the claimant's gait. In his deposition Dr. Dye

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9. Claimant's calculation of a 12 percent loss of use is apparently based on the differences between the claimant's left and right feet as measured by Dr. Swartz. However, the relevant charts in the AMA guidelines do not use such a standard. Instead, they appear to compare measurements of an injured foot with measurements of normal feet from the general population.

attributed the claimant's complaints of hip and back pain to an altered gait, and testified that he observed the claimant limping on intermittent occasions. Tr. at 15-16, 22, 58-59. In contrast, Dr. Wolf reported that the claimant appeared to have a normal gait when he examined the claimant on July 31, 1991. EX 5. Likewise, Dr. Indeck reported that the claimant walked with a completely neutral gait during his examination of the claimant on April 24, 1992. EX 6 at 368. Also, at the hearing Dr. Indeck testified that the claimant showed absolutely no evidence of an altered gait in a surveillance film showing the claimant walking down a hill on November 22, 1991. Tr. at 147.

Although the employer has presented evidence indicating that on at least three occasions the claimant's gait was not altered, this evidence is not necessarily inconsistent with Dr. Dye's testimony that he occasionally observed the claimant limping. It is also noted that none of the medical reports has suggested that the claimant is exaggerating his symptoms and that Dr. Dye testified that it is not uncommon for someone who has had a significant knee injury to develop an altered gait as a result. CX 7 at 22. For these reasons, I conclude that at least on some occasions the claimant's gait has been altered by his knee injury and that as a result he may suffer occasional pain in his right hip and leg. The claimant has argued that this pain has resulted in a 10 percent loss of use of his right leg. However, I find that any pain the claimant may have in his right hip and leg is not compensable. Although in theory pain by itself can result in the partial loss of use of a limb and therefore can be compensable under subsection 8(c) of the Act, there is nothing in the record of this case directly indicating that any pain in the claimant's right hip and leg is so severe that it limits in some way the claimant's use of his right leg. Moreover, even if it could be assumed that pain limited the use of the claimant's right hip and leg, there is no

evidence from any physician attempting to quantify the extent of any such loss of use. Indeed, Dr. Swartz described the claimant's hip pain as not being ratable. CX 4 at 69. Accordingly, it is not possible to arrive at an award of benefits for any loss of use of the claimant's right leg that would not be entirely speculative.

4. *Back Pain*. The claimant has also alleged that the alteration in his gait has caused him to suffer back pain. It is well established that an injury to a claimant's back is not a scheduled injury and therefore has to evaluated under subsection 8(c)(21) of the Act. That provision specifies that the compensation for unscheduled disabilities shall be two-thirds of the difference between the injured employee's average weekly wage and the employee's wage earning capacity after the injury. Since subsection 8(c)(21) bases benefits on the difference between a claimant's average weekly wage and his post-injury wage earning capacity, a claimant under the Longshore Act may not recover benefits for an unscheduled injury unless the injury actually reduces his earning capacity. *See Arrar v. St. Louis Shipbuilding Company*, 837 F.2d 334 (8th Cir. 1988). Significantly, in this case the claimant has not alleged that his back pain has reduced his wage earning capacity and none of the medical reports suggests that such a loss has occurred.[10] Accordingly, I find that the claimant is not entitled to any monetary compensation for any back pain that may have been the result of the injury to his left knee.[11]

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10. For example, Dr. Wolf reported that the claimant's low back pain required no treatment and was not ratable. EX 5. Likewise, Dr. Indeck found that the claimant's complaints of back pain did not warrant any specific work preclusion or medical treatment. EX 6 at 371. Dr. Swartz also concluded that the claimant's back condition did not meet any disability rating criteria. CX 4 at 66.

11. It is noted that if in fact the claimant's back impairment were (Cont'd)

5. The Employer's Entitlement to Subsection 8(f) Relief

The employer has filed an application indicating that if the claimant's injuries are found to be compensable, it should be granted relief pursuant to the provisions of subsection 8(f) of the Act. To obtain such relief an employer must show that (1) the claimant had an existing permanent partial disability prior to the last injury, (2) that the disability was manifest to the employer, and (3) that the current disability was not due solely to the most recent injury. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 839 (9th Cir. 1982). *See also FMC Corp. v. Director. OWCP*, 886 F.2d 1185 (9th Cir. 1989). In general, if subsection 8(f) is found to apply an employer is relieved of the responsibility for paying permanent disability compensation after 104 weeks. In cases involving non-hearing loss scheduled disabilities, however, an employer is ordinarily liable for the period of weeks of scheduled disability benefits that are attributable to the subsequent injury, even if that period exceeds 104 weeks. *Davenport v. Apex Decoration Company*, 18 BRBS 194, 196, n. 1 (1986). *See also Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986). The 104 week period in subsection 8(f) does not include any periods in which temporary disability payments were due. *Romanowski v. I.T.O. Corp.*, 4 BRBS 59 (1976).

It is possible that the evidence in this record is sufficient to meet the three conditions for subsection 8(f) relief. However, it

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compensable under the provisions of subsection 8(c)(21), then all of the claimant's impairments would have to be evaluated under that provision. *See Frye v. Potomac Electric Power Company*, 21 BRBS 194, 198 (1988), and *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988).

has been determined that all of the claimant's compensable disabilities are scheduled injuries. Consequently, under the provisions of subsection 8(f) the employer is not entitled to relief, even though the claimant is entitled total more than 104 weeks of benefits for these injuries. The employer's request for subsection 8(f) relief must therefore be denied.

ORDER

1. The respondents shall pay the claimant compensation for total temporary disability for the period between March 13, 1989, and February 2, 1990, at a compensation rate of $238.46 per week.

2. The respondents shall pay the claimant compensation for total permanent disability for the period between February 2, 1990, and November 12, 1990, at a compensation rate of $238.46 per week.

3. The respondents shall pay the claimant compensation for permanent partial disabilities in his left knee and right foot for a total of 106.56 weeks beginning November 12, 1990, at a compensation rate of $238.46 per week.

4. The respondents shall receive credit for all compensation paid to the claimant since March 13, 1989.

5. The claimant is entitled to interest on all past due compensation at the rate prescribed at 28 U.S.C. §1961.

6. The District Director, OWCP, shall make all calculations necessary to carry out this order.

7. The employer's request for relief under the provisions of subsection 8(f) of the Act is denied.

8. Counsel for the claimant shall within 30 days of the date of this order submit a fully supported fee petition and simultaneously serve a copy thereof on opposing counsel. Opposing counsel shall have 20 days from the date of service of the petition in which to respond.

s/ Paul A. Mapes
Paul A. Mapes
Administrative Law Judge

Date: AUG 27 1992
San Francisco, California

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing Compensation Order was filed in the Office of the Regional Director, Thirteenth Compensation District and a copy thereof was mailed by certified mail to the parties and their representatives at the last known address of each on August 31 1992.

John Papai
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San Francisco, CA 94133

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Appendix G

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copy was also mailed by regular mail to the following:

Office of Administrative Law Judges, U.S. Department of Labor, Suite 600, 211 Main Street, San Francisco, CA 94105.

Daniel W. Teehan, Regional Solicitor, U.S. Department of Labor, 71 Stevenson Street, P. O. Box 3495, San Francisco, CA 94119-3495.

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2620, 200 Constitution Avenue, N.W. Washington, D.C. 20210.

Appendix G

s/ Diana Bigham, for
D.L. OPPENHEIM
District Director
13th Compensation District

APPENDIX H — RELEVANT STATUTES

33 U.S.C. § 902. Definitions

When used in this chapter —

. . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include —

. . .

(G) a master or member of a crew of any vessel;

. . .

46 U.S.C. § 688 (a)

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . .

(2)

No. 95-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HARBOR TUG AND BARGE COMPANY,

Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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24pp

QUESTIONS PRESENTED

1). Is an injured maritime worker barred from recovering as a seaman under the Jones Act, 46 U.S.C. App. §§ 688, *et seq.*, after an Administrative Law Judge determines that he was an LHWCA worker at the time of injury?

2). Is an injured maritime worker's status as a seaman to be determined by his work history only with his employer at the time of the injury, or with each of his maritime employers?

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The instant case was filed in January of 1990. The District Court granted petitioner Harbor Tug & Barge (''HT&B'') a partial summary judgment the following May on the ground that the Plaintiff (''Papai'') was not a seaman under the Jones Act.[1] Though the trial court certified that ruling for interlocutory review, under 28 U.S.C. § 1292(b), The Ninth Circuit refused to consider it. The matter was thereafter rebriefed

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[1] *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 205 (9th Cir. 1995).

and reargued before the trial court, in light of *McDermott International, Inc. v. Wilander*[2] and *Southwest Marine, Inc. v. Gizoni*[3], but the original ruling was reaffirmed on April 6, 1992.

Temporarily bereft of his Jones Act remedies, and having no immediate recourse to the Court of Appeals, Papai filed a compensation claim under the LHWCA. In violation of the equitable estoppel outlined in *Roth v. McAllister Bros., Inc.*,[4] and eschewing the partial summary judgment it had received in District Court, HT&B then turned around and asked the Administrative Law Judge ("ALJ") to dismiss Papai's LHWCA claim on grounds that he was "a member of a crew of a vessel" under 33 U.S.C. § 902(3)(G). Plaintiff's workers' compensation attorneys failed to raise *Roth*, or the doctrine of equitable estoppel in response. With all due respect to our colleagues, this was not good lawyering. Worse, the ALJ erroneously concluded that the prior summary judgment posed no collateral estoppel because the District Court's ruling was still subject to appeal. But, "the federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as *res judicata* or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding *de novo*."[5] Unfortunately the ALJ ignored that rule, concluded all over again that Mr. Papai was not a seaman, and issued a formal decision awarding him LHWCA benefits in August of 1992.[6]

Shortly afterward, in the ongoing litigation, the District

[2] 498 U.S. 337 (1991).

[3] 502 U.S. 81 (1991).

[4] 316 F.2d 143 (2d Cir. 1963).

[5] 1B *Moore's Federal Practice* (2d ed.) ¶0.416[3] p. 521-522. *See also, Hunt v. Liberty Lobby*, 707 F.2d 1493, 1497 (D.C. Circ. 1983).

[6] *Papai, supra*, 76 F.3d at 205.

Court tried the plaintiff's remaining third-party tort claim for vessel owner negligence in admiralty, because the partial summary judgment had deprived him of his Jones Act jury rights, and entered a judgment in favor of the defendant in December of 1992. Plaintiff appealed and the Ninth Circuit reversed the District Court's judgment and remanded the case for a Jones Act jury trial notwithstanding the ALJ's intervening, albeit unnecessary, determination that Papai was not a seaman. The trial is now set for November 25, 1996.

The Ninth Circuit decision below reversed the granting of summary judgment on seaman status by finding that there was a triable issue of fact as to Papai's permanent connection to the vessel. In so far as the decision below expands upon the legal standards set forth in *Chandris, Inc. v. Latsis*[7] to include maritime employers beyond the one at the time of injury, it is *dictum* because all of Papai's assignments were with HT&B up to the time of his accident.

Likewise, in so far as the decision below relates to the relationship between the ALJ and District Court adjudications of seaman status, it is also *dictum* because the ALJ should have based his decision on the district judge's determination (granting partial summary judgment) rather than deciding it on his own.

Needless to say, this unlikely skein of errors, omissions and parallel decisions is not likely to occur again. Those convolutions freight the record in this case with obvious prudential problems.

[7] ___ U.S. ___, 115 S.Ct. 2172 (1995).

REASONS FOR DENYING THE WRIT

I. BECAUSE THE NINTH CIRCUIT REMANDED THIS CASE FOR TRIAL, IT IS NOT YET RIPE FOR SUPREME COURT REVIEW.

HT&B has petitioned for certiorari even though the Ninth Circuit remanded this case for a jury trial in District Court. Because the jury could decide that Mr. Papai was not a Jones Act seaman, HT&B could ultimately obtain the result it wants without Supreme Court intervention. In short, the petition is interlocutory and premature. As this Count ruled in *Brotherhood of Loc. Fire & Eng. v. Bangor & A. R. Co.*:[8]

> "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."[9]

This Court should rule the same way here for the same reason.

II. THERE IS NO DIRECT, IRREMEDIABLE CONFLICT BETWEEN THE CIRCUITS.

As this Court stated in *Gizoni*,[10] an employee who receives voluntary payment under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act.[11] The only remaining question, then, is what happens "[w]hen the compensation process has gone beyond acceptance of benefits and even beyond the filing of a claim to the point at which a formal award has been entered"?[12] HT&B

[8] 389 U.S. 327 (1967)
[9] *Id.* at 328
[10] 502 U.S. at 91-92.
[11] 33 U.S.C. § 903(e)
[12] 4A Larson, *The Law of Workman's Compensation*, § 90.51 at 16-357.

insists that a formal award should bar injured employees like John Papai from seeking subsequent seaman's remedies. Its petition suggests that the decision below stands alone in prohibiting that result. But as *Gilmore and Black* summed up:

> "Even the payment of benefits pursuant to a formal award in a contested proceeding is not necessarily fatal to the Jones Act action. The courts have shown themselves receptive to the argument that the compensation award may have been made without a proper adjudication of the claimant's status as harbor worker or seaman."[13]

Indeed, quite apart from the decision below, there are reported state and federal decisions which conclude outright that, because of special policies involved, a Jones Act case cannot be barred by a formal compensation award.[14] The petition overlooks those cases, and that policy, when it contends that the decision below conflicts squarely with the opinions of the Fifth and Second Circuits. Nothing about this corner of the law is perfectly square.[15]

[13] *G. Gilmore & C. Black, The Law of Admiralty*, 435, *text accompanying fn. 335n*, (2d ed. 1975) *citing*, Larson, *supra*, § 90.51, at 16-357; *Simms v. Valley Line Co.*, 709 F.2d 409, 412-413 (5th Cir. 1983), *Boatel, Inc. v. Delamore, citing*, 379 F.2d 850, 854-855 (5th Cir. 1967); *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 700-701 (5th Cir. 1963). See also *Bretsky v. Lehigh Valley R.R. Co.*, 156 F.2d 594, 596 (2d Cir. 1946) [declining to bar FELA claim with prior state compensation award where question of interstate comerce had not been litigated].
[14] *Biggs v. Norfolk Dredging*, 360 F.2d 360, 365 (5th Cir. 1966); *De Court v. Beckman Instruments, Inc.*, (1973) 32 Cal.App.3d 628, 635, 108 Cal.Rptr.109; *see also, Simms. supra.*
[15] As this Court observed in *Chandris*, when it comes to questions of Jones Act status, 'We have made a labyrinth and got lost in it.' *Chandris, supra*, ____ U.S. at ____, 115 S.Ct. at 2184.

HT&B contends that the decision below conflicts with the Fifth Circuit's opinions in *Sharp v. Johnson Bros. Corp.*[16] and *Fontenot v. AWI Inc.*,[17] and the Second Circuit's opinions in *Hagen v. United Fruit Co.*[18] and *Roth v. McAllister Bros., Inc.*[19] However, as demonstrated below, these cases are either compatible, distinguishable or no longer good law.

First, the Second Circuit's decision in *Roth* is perfectly compatible with the decision below. Far from presecuting a Jones Act claim in the wake of a compensation award, the plaintiff in *Roth* acquiesed in his employer's assertion that he was a tugboat hand and a Jones Act seaman, and suffered the denial of his state workers' compensation claim by the New Jersey Department of Labor and Industry.[20] When his widow subsequently petitioned the District Court for the Southern District of New York for an award of maintenance, the employer turned around and argued that the decedent had *not* been a seaman. The District Court rejected that argument and so did the Second Circuit. Ruled the Second Circuit:

> "A party having assumed a certain position in a legal proceeding and having succeeded in maintaining that position, as defendant did here by its motion before the New Jersey Compensation Court, may not thereafter assume a contrary position in a subsequent proceeding elsewhere simply because its interests have changed, especially if the change be to the prejudice of the party who has acquiesced in the position formerly taken."[21]

[16] 923 F.2d 423 (5th Cir. 1992)
[17] 923 F.2d 1127 (5th Cir. 1991).
[18] 135 F.2d 843 (2d Cir. 1943).
[19] 316 F.2d 143 (2d Cir. 1963).
[20] *Roth, supra,* 316 F.2d at 144-145.
[21] *Id.* at 146.

There is nothing in that ruling which conflicts with the decision below. Neither John Papai nor HT&B ever acquiesced in the position of the other. Moreover, as both the decisison below and this Court's opinion in *Gizoni* remind us, '[w]here full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear.'[22] Thus, there were no equitable reasons to estop any of the parties' arguments in the present case. To the contrary, as the decision below explained:

> "In determining whether prior litigation of plaintiff's LHWCA claims bars his subsequent Jones Act claim, we are mindful of the reasoning expressed by the *Gizoni* Court and are further concerned with the fairness in imposing such a bar where it could work a disincentive on the part of the employer to vigorously litigate its defense in the LHWCA action. This is so because the parties are on opposite sides of the seaman issue under the LHWCA as compared with their positions under the Jones Act. Furthermore, imposing such a bar would result in subjecting to suit an employer who immediately and voluntarily begins compensation payments while immunizing from suit an employer who forces his employee to seek compensation through litigation."[23]

This reasoning is perfectly consistent with the ruling in *Roth*.

Nor is the decision below in conflict with the Second Circuit's dusty ruling in *Hagen v. United Fruit Col.*[24]. While

[22] *Papai,supra,* 67 F.3d at 207, *quoting, Gizoni, supra,* 502 U.S. at 92, fn. 5.
[23] *Papai, supra,* 67 F.3d at 207.
[24] 135 F.2d 842 (2d Cir. 1943).

Hagen did in fact conclude that an administrative award under the LHWCA was a bar to subsequent Jones Act litigation (''because no such award could be made validly without a determination that plaintiff was not a member of the crew''),[25] that holding was handed down back in 1943 when 33 U.S.C. § 903(a) still flatly provided that compensation was not payable ''in respect of disability or death of . . . a member of a crew of any vessel.'' The *Hagen* Court therefore viewed ''a finding as to non-membership in the crew to be what has been called a finding of a 'jurisdictional fact.' ''[26] In other words, the rule in *Hagen* was based on preemptive jurisdiction, not collateral estoppel. Such strictures have since been removed by Congress.

33 U.S.C. § 903(a) was amended, together with the rest of the Act, in 1972 and again in 1984, and does not speak of crew members any more. Those amendments ''changed what was essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured.''[27] Ever since the '84 amendments, the so-called ''crew member'' exclusion has resided among the Act's ''status'' provisions in 33 U.S.C. § 902(3)(G), where it is stated as a statutory exception to the definition of a covered ''employee.''[28] Rather than posing questions of ''jurisdictional fact'', the modern status test merely presents

[25] *Id.* at 843.

[26] *Id.*

[27] *Northwest Marine Terminal Co. Inc. v. Caputo, supra,* 432 U.S. 249, 264-265 (1977).

[28] 33 U.S.C. § 902(3)(G) [''The term 'employee' means any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, shipbuilder, and ship-breaker, but such term does not include — * * * (G) a master or member of a crew of any vessel;''].

issues of ''coverage.''[29] In sum, *Hagen* is no longer good law. As such, it does not conflict with the decision below.

Neither does the holding in *Fontenot*. First of all, there is nothing in *Fontenot* to suggest that the plaintiff received a formal LHWCA award from an Administrative Law Judge (or ''ALJ''). To the contrary, it merely appears that the deputy commissioner issued an informal recommendation that the plaintiff's injury fell within the Act's coverage.[30] Once a claim has been filed, the deputy commissioner is empowered to make informal investigations and recommendations, but no formal determinations.[31] Since 1972, all adjudicatory power under the Act has been entrusted to the Office of the Administrative Law Judge.[32] As we have already seen, the simple fact that a worker files a claim before the deputy commissioner, or receives LHWCA benefits without a formal award, has never barred a subsequent Jones Act claim.[33] *Fontenot* is misplaced to the extent that it suggests anything to the contrary.[34]

Fontenot also holds that workers' compensation is the exclusive remedy for all maritime workers covered by the LHWCA.[35] ''However,'' as this Court explained in *Gizoni*, ''this argument ignores the fact that some maritime workers may be Jones Act seamen performing a job specifically enumerated under the LHWCA.''[36] *Fontenot*, of course, was handed down several months before the Supreme Court's

[29] *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 1359 (9th Cir. 1981).

[30] 923 F.2d at 1128.

[31] 33 U.S.C. § 919(c).

[32] *Id.*

[33] E.g., *Biggs, supra; Boatel, supra,* 379 F.2d at 854.

[34] *Gizoni, supra,* 502 U.S. at 90-92.

[35] 923 F.2d at 1132.

[36] 502 U.S. at 89.

decision in *Gizoni*, and like *Hagen* before it, is no longer good law. At all events, it cannot be said to create a certworthy conflict with the decision below.

While the language in *Sharp*[37] does not square with the reasoning or result in the decision below, both cases present peculiar, fact-bound decisions arising from convoluted procedural histories that are not likely to recur. Therefore, any conflict between the two decisions should not be the basis for Supreme Court review.

If anything, the procedural history in *Sharp*, was more convoluted than the one in this case. The plaintiff there, Earnest Sharp, initiated administrative proceedings with the deputy commissioner shortly after his November 1985 accident. After the deputy commissioner notified the parties that the injury "'appear[ed] to fall under the jurisdiction of the [LHWCA]' ",[38] the employer began to pay voluntary benefits. In November of 1986, however, Sharp filed a parallel Jones Act suit in District Court. The employer promptly terminated LHWCA benefits, and "raised the defense that Sharp was a Jones Act seaman and thus not eligible for longshore compensation."[39] The parties did not request an ALJ hearing, but pushed the District Court case to trial instead.

In June of 1989, the District Court granted the employer a directed verdict in Sharp's Jones Act case "on the grounds that the barges were not vessels and that he was not a seaman."[40] Sharp appealed that determination to the Fifth Circuit the following October. By September of 1989, however, Sharp had settled his LHWCA claims for $225,000.

[37] *Id.* at 426.
[38] *Sharp, supra*, 973 F.2d at 424.
[39] *Id.*
[40] *Id.*

A final release was executed on October 5, 1989 (just as the Jones Act case was being transferred to the Court of Appeals), and the ALJ promptly approved the settlement.[41] But the parties never advised the Court of Appeals of their agreement. In November of 1990, the Fifth Circuit therefore reversed the directed verdict and remanded the case for another trial "on the ground that a fact question existed as to whether Sharp worked aboard a fleet of vessels and thus was a seaman."[42]

On remand, the District Court granted the employer summary judgment on grounds that Sharp's LHWCA settlement comprised an election against his Jones Act rights.[43] The Fifth Circuit affirmed under the doctrine of collateral estoppel, ruling that "where the ALJ issues a compensation order ratifying a settlement agreement, a 'formal award' should be deemed to have been made under *Gizoni*, and the injured party no longer may bring a Jones Act suit for the same injuries."[44]

The result and rationale in *Sharp* are at least as inextricably tied up with the peculiar history and facts as the present case. Indeed, they seem to have been fashioned out of pique, in the wake of *Sharp 1*, by a Circuit Court that was understandably weary of the case before it and annoyed with the attorneys who brought it there. As the Fifth Circuit bluntly noted:

> "[W]e are distressed by the conduct of the attorneys for Sharp, Johnson Brothers, and Wausau during [a] previous appeal. Although we have no basis upon which to ascertain their motives, we are surprised that the parties failed to bring to our attention the fact that they had settled at least one

[41] *Id.*
[42] That decision was also published under the title of *Sharp v. Johnson Bros. Corp.*, 917 F.2d 883 (5th Cir. 1991) and shall hereinafter be referred to as *Sharp 1*.
[43] *Sharp, supra*, 973 F.2d at 424-425.
[44] *Id.* 973 F.2d at 426.

> aspect of their dispute. We recognize that counsel may legitimately have believed that the LHWCA settlement was irrelevant to the Jones Act action. Nevertheless, candor and respect for this court would dictate that the parties inform us of so significant a development in their litigation."[45]

Whether or not that distress spilled over into the Fifth Circuit's reasoning, it is very difficult to see how this Court can reach the issues framed by *Sharp* and the decision below without wading through the complicated facts, curious strategies and tangled histories that bedeviled both cases. Furthermore, even if a clear cut conflict were somehow visible through that thicket, its ultimate resolution would be far surer and easier if it is given more time to percolate through the lower courts.[46]

This Court did not really confirm the mutual exclusivity of these two statutes until February of 1991, when the *Wilander* case finally held that "a member of a crew" under the LHWCA and a "seaman" under the Jones Act are one and the same creature.[47] Until then there was widespread confusion on that point.[48] It is only since *Wilander* that the courts have come to recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based

[45] *Sharp, supra,* 973 F.2d at 427 fn. 3.

[46] *See gen.* Stern, Gressman & Shapiro, *supra,* § 4.4, at 200, Comment, "Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?" 54 U.Pitt.L.Rev. 861 (1993).

[47] *Supra,* 498 U.S. at 352.

[48] *Id.* at 814 [noting that "The confusion began with *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251 (1940)."]. *Compare, Bassett, supra,* 309 U.S. at 260, *and, Ramos v. Universal Dredging Corp.,* 547 F. Supp. 661, 667 (D.C.Ha. 1982), *Lewis v. Roland E. Trego & Sons,* 359 F.Supp. 1130 (D.C.Md. 1973); *Ramos v. Universal Dredging Corp.* 15 Ben.Rev.Bd.Serv. 140 (BRB, 1982).

and sea-based maritime employees."[49] As last summer's *Chandris* decision demonstrates, we are still in the process of drawing that distinction. Indeed, as *Sharp* suggests, a few courts still haven't digested the notion that "some maritime workers may be Jones Act seamen performing a job specifically enumerated in the LHWCA."[50] At all events this Court's *Gizoni* decision, and the corollary question of whether "some maritime workers" can still sue for Jones Act remedies after receiving a formal LHWCA award, hasn't really had a chance to percolate through the lower courts. The decision below, after all, merely "extended the reasoning of the *Gizoni* court to the next logical step."[51] Such extrapolation is the engine that drives all judicial interpretation.

It is well settled, especially in the centuries old and slow-changing field of maritime law,[52] that this Court will not usually consider an important question until the lower courts have had ample time to "sift" through it for themselves.[53] The idea is that this Court's ultimate "resolution will be better informed if it gives the conflict time to 'percolate' in the lower courts."[54] That would certainly seem to be the case here. While HT&B's petition focuses solely on the supposedly stark inter-circuit conflict between *Sharp* and *Papai,* the situation is nowhere near that clear cut.[55]

Because "[t]he decision to grant certiorari represents a commitment of scarce judicial resources,"[56] those valuable

[49] *Wilander, supra,* 498 U.S. at 353.

[50] 502 U.S. at 89

[51] *Papai, supra,* 67 F.3d 208.

[52] *See gen.* Tetley, The General Maritime Law — *the Lex Maritima,*" 20 Syracuse J. Int'l L & Comm. 105, 107 (Sp. 1994).

[53] *Moragne v. State Marine Lines,* 398 U.S. 375, 408 (1970).

[54] Sturley, *Filing and Responding to a Petition for Certiorari,* 24 J. of Mar. Comm. 595, 625 (October 1993).

[55] *Compare, e.g. Simms, Boatel,* and *Young & Co. v. Shea,* 397 F.2d 185 (5th Cir. 1968) to *Sharp.*

[56] *Oklahoma City v. Tuttle,* 471 U.S. 808, 816 (1985).

resources should not be squandered to resolve such conflict as exists between *Sharp* and the decision below. Both decisions involve complex procedural histories, and are clearly and distinctly tied to the peculiar facts that produced them.

III. THE QUESTION OF WHETHER A UNION HAND'S ENTIRE WORK HISTORY SHOULD BE EXAMINED, WHEN WEIGHING "THE TOTAL CIRCUMSTANCES" OF HIS VESSEL-RELATED EMPLOYMENT UNDER *CHANDRIS* IS NOT YET RIPE FOR SUPREME COURT REVIEW.

After decades of confusion, it is now finally established that the test for seaman status is "composed of two distinct elements: 1) The worker must have an 'employment related connection to a vessel in navigation' and 2) The worker must 'contribute to the function of the vessel or to the accomplishment of its mission.' "[57] Just last summer, the *Chandris* decision reviewed the first of those two elements and confirmed that "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."[58] Illuminating the issue further, *Chandris* also affirmed that "the total circumstances of an individual's employment must be weighed to determine whether he had sufficient relation to the navigation of vessels and the perils attendant thereon."[59] The decision below quoted that language verbatim and ruled that, at least in the case of a "casual" worker dispatched from a union hiring hall to different tugs and different employers on a day to day basis,[60] "all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to

[57] 1 Schoenbaum, *Admiralty and Maritime Law* (3d ed.) 260 *quoting Wilander, supra*, 498U.S. at 344.
[58] *Chandris, supra*, ____ U.S. at ____, 115 S.Ct. at 2191.
[59] *Chandris, supra*, ____ U.S. at ____, 115 S.Ct. at 2191.
[60] *Papai, supra*, 67 F.3d at 204-205.

(and after, if any) the accident, as well as work performed for other employers during the relevant time should be considered in making the [seaman status] determination."[61] Reasoned the Court:

> "There would appear to be no reason that a group of employers who join together to obtain a common labor pool on which they draw by means of a union hiring hall (in this case the Inland Boatman's Union hiring hall), should not be treated as a common employer for purposes of determining a maritime worker's seaman status. If the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system. Under such circumstances, a maritime worker who regularly performs seaman's work is entitled to seaman status."[62]

Though the ink is barely dry on *Chandris*, HT&B petitions this Court to review the interpretation of it in the decision below. Unlike the first question raised by the petition, there actually is a direct conflict between the Third, Fifth and Ninth Circuits over the seaman status of "casual" workers, like John Papai, who spend all or most of their time aboard tugs, ships and other vessels but lack a permanent connection with any particular vessel or vessel owner.[63] Under the decision below, the Ninth Circuit is prepared to treat such workers as seamen. They not only perform what this Court has called "a classic

[61] *Id.* at 206.
[62] *Id.*
[63] *See gen.* Albritton & Robinson, *Seaman Status After Chandris, Inc. v. Latsis*, 8 U.S.F.Mar.L.J. 29, 71 (Sp. 1996).

seaman's job'',[64] but they are exposed to " 'the special hazards and disadvantages to which they who go down to the sea in ships are subjected.' ''[65] The Third and Fifth Circuits, however, have taken a different view.[66] Nevertheless, this issue too should be given more time to percolate.

First of all, the fact that the decision below was fact-bound and interlocutory is just as fatal to this portion of HT&B's petition as it was to the other.[67] This case, once again, has been remanded for trial later this year. A jury may yet find against John Papai's seaman status, deny his negligence and unseaworthiness claims or otherwise grant HT&B the relief it desires without the need for this Court's intervention.

Moreover, Papai had only worked with HT&B up to the time of his accident. Therefore, were this Court to find, as petitioner hopes, that the Ninth Circuit erred in stating a claimant's seaman status should be based upon his work history with all his employers, the decision would not affect the determination of Papai's status because Papai worked only for HT&B. Thus even if this Court wants to consider this issue, this is not the case to accept for that purpose.

More importantly, the petitioner's seaman status arguments just don't give this Court any good reasons for returning to a subject that it has so recently and repeatedly addressed. Between 1991 and 1993, for example, the Court denied certiorari in numerous interesting Jones Act cases[68] (including

[64] *Chandris, supra,* ____ U.S. at ____, 115 S.Ct. at 2191

[65] *Id.* at 2190.

[66] *Compare, Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1074 (5th Cir. 1986) *and Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247, 1251 (3d Cir. 1994) with the decision below.

[67] *Brotherhood of Loc. Fire & Eng. v. Bangor & A.R. Co., supra;* Sturley, *supra.*

[68] *See e.g., Bolden v. Offshore Specialty Fabricators, Inc.*, 113 S.Ct. 2441 (1993); *National Union Fire Insurance Co. v. Electro-Coal Transfer Corp.*,

not only *Harwood v. Partredereit AF* and *Bach v. Trident Steamship Co.*[69] but *Ashley v. Epic Divers, Inc.*)[70] simply to give the lower courts time to fathom *Wilander* and *Gizoni* before returning to those issues. After voyaging through those issues yet again, just last summer in *Chandris*, there is even less reason to resurvey the now well-charted test for seaman status. *Chandris* has hardly dropped anchor among the circuits. The decision below was one of the first decisions to apply and interpret it on the West Coast. Whether or not the decision below misreads *dictum* from *Chandris*, and respondent respectfully submits that it does not, this Court should let that *dictum* make a few more landfalls before hauling it up on the ways again.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents

113 S.Ct. 1262 (1993); *Campo v. Electro-Coal Transfer Corp., Inc.*, 112 S.Ct. 1261 (1992); *Setton Construction Inc. v. Domingue*, 113 S.Ct. 77 (1992)

[69] *Back v. Trident Steamship Co.*, 112 S.Ct. 1996 (1992); *Harwood v. Partredereit AF*, 112 S.Ct. 1265 (1992).

[70] 113 S.Ct. 1415 (1993).

(3)

No. 95-1621

In The

Supreme Court of the United States

October term, 1995

HARBOR TUG AND BARGE COMPANY, INC.,

Petitioner,

v.

JOHN PAPAI AND JOANNA PAPAI,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF INDUSTRIAL INDEMNITY COMPANY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF INDUSTRIAL INDEMNITY COMPANY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

Industrial Indemnity Company respectfully move for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case. The consent of the attorney for petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

Industrial Indemnity Company is a major underwriter of employer risk insurance in west coast markets. Among other things, it insures state workers' compensation risks, United States Longshore and Harbor Workers' Compensation Act[1] (hereinafter "LHWCA") risks, and the various employer risks attendant to the Jones Act[2] and the general maritime law of the United States. Industrial Indemnity Company has a strong interest in promoting the swift, fair, and consistent resolution of employee claims brought against its insured employers.

This case presents two questions, the answers to which are determinative of employee status vis-a-vis the Jones Act and the LHWCA. The first concerns application of 'mutual exclusivity' to employee injury claims made under both the Jones Act and the LHWCA. The second concerns the 'fleet seaman' doctrine. The Ninth Circuit answered both in its own unique way. In short, the Ninth Circuit held that a prior determination of employee status made by an Administrative Law Judge in an LHWCA

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[1] 33 U.S.C. §§ 901 *et seq.*

[2] 46 U.S.C. § 688.

trial is not binding on the parties in subsequent litigation. The Court also held that, in determining seaman status, the trier of fact shall examine, if necessary, the employee's work for any number of pre-injury employers. In so holding, the Ninth Circuit embarked, in the first instance, on a course reciprocal from that taken by this Court and the Fifth Circuit; and, in the second instance, on a course tangential to that taken by this Court just last year.

We submit that the Ninth Circuit has strayed well off-course in both instances. In electing to stand into danger, it has declined to follow well reasoned decisions of the Second and Fifth Circuits . It has relegated administrative decisions to a backwater existence. It has also suggested that seamen now carry their status on their backs, regardless of the nature of their employment at the time of injury.

These issues are important to *amicus curiae* because they affect both underwriting and claims handling practice for hundreds of its insureds. At best, maritime employers will now be forced to litigate these claims in two forums with the full knowledge that claimants get a free swing under the LHWCA. This can only increase the cost per claim. At worst, all employers in the Ninth Circuit will be forced to purchase insurance that will respond to Jones Act claims, simply out of fear that they might unknowingly hire a seaman. Or, on the other hand, employers will face a different liability if they refuse to hire seamen.

The course taken by the Ninth Circuit in this case will increase the cost of doing business for both underwriters and employers affected by its decision. At the same time, the Ninth Circuit has invoked a rule that has no effect on the injured worker's net recovery. The Ninth Circuit's course is counterproductive, wasteful of judicial resources and contrary to law.

Amicus curiae therefore submits that the Court should grant the petition and resolve both the intercircuit conflict and the conflict with decisions of this Court by adopting the approach of the Second and Fifth Circuits regarding the preclusive effect of LHWCA proceedings and by reaffirming this Court's seaman status test announced just last year.

Respectfully submitted,

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July 26, 1996

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INTEREST OF THE *AMICUS CURIAE*

The interest of the amicus curiae is as set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

This case arises out of a maritime personal injury. John Papai was a day worker hired by Petitioner Harbor Tug & Barge Co. to work for one day painting its tug POINT BARROW while she lay alongside at Alameda, California. Mr. Papai was injured when he fell from a ladder while painting the vessel.[1] He subsequently filed a claim with the United States Department of Labor, Office of Worker Compensation Programs, seeking benefits available under the United States Longshore and Harbor Workers' Compensation Act[2] (hereinafter "LHWCA"). Mr. Papai also decided to seek recovery for his injuries

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[1] See the opinion below, *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203 (9th Cir. 1995) and Decision and Order of the United States Department of Labor, August 27, 1992, Case No. 92-LHC-403, reprinted as Appendix G to Petition for Writ of Certiorari (Papai's LHWCA case) (Pet. App. G).

[2] 33 U.S.C. §§ 901 *et seq.*

under the Jones Act[3] and the general maritime law[4] by filing suit in the United States District Court. In order to pursue these seaman remedies, Mr. Papai had to claim that he was, in fact, a seaman.

As has been repeatedly noted by this Court, recently in *McDermott International, Inc., v. Wilander,*[5] (*Wilander*), and in *Southwest Marine, Inc., v. Gizoni,*[6] (*Gizoni*), and most recently in *Chandris, Inc. v. Latsis,*[7] (*Latsis*), and as was intended by Congress when it excluded masters and members of the crew from coverage under the LHWCA,[8] the two remedial schemes pursued by Mr. Papai are mutually exclusive. The problems herein arose when, after an LHWCA trial before an Administrative Law Judge, it was determined that Mr. Papai was **not** a seaman,[9] and therefore eligible for LHWCA benefits. In Mr. Papai's companion District Court case, Judge Legge reached the same conclusion and dismissed Mr. Papai's seaman causes of action. The Ninth Circuit, in reversing the District Court, reinstated Mr. Papai's seaman causes. In the interim, Mr. Papai received LHWCA benefits and the decision of the Administrative Law Judge became

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[3] 46 U.S.C. § 688.

[4] These include claims for maintenance and cure (benefits paid regardless of fault) and claims against PT. BARROW and her owner for unseaworthiness.

[5] 498 U.S. 337 (1991).

[6] 502 U.S. 81 (1991).

[7] ___ U.S. ___, 115 S.Ct. 2172 (1995).

[8] 33 U.S.C. § 902(3)(g).

[9] Pet.App. G, pp. 34a-37a.

final. To date, there has been no appeal from the Decision of the Administrative Law Judge.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ACT TO PRESERVE THE MUTUAL EXCLUSIVITY OF THE RESPECTIVE REMEDIAL REGIMES AND RESOLVE THE CONFLICT BETWEEN THE CIRCUITS

Both the Jones Act[10] and the LHWCA are remedial regimes designed to affect compensation for injured workers. When coupled with the various state workers' compensation programs, they provide coverage for employees ashore, at sea and while on the waterfront. As was noted most recently by this Court in *Latsis,*[11] Jones Act remedies and the remedies available under the LHWCA are mutually exclusive. One can be a Jones Act seaman or one can be a maritime worker covered under LHWCA, but not both. The question presented herein is "what event triggers the mutual exclusivity between these regimes?"

The Ninth Circuit has approached this issue with 20-20 hindsight. That is, mutual exclusivity is triggered

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[10] Hereinafter, the term "Jones Act" will be used generically, describing the panoply of remedies available to seamen. These include the payment of maintenance, cure and unearned wages, remedies available regardless of fault, and the fault based civil remedies of negligence and unseaworthiness.

[11] "As the Court has stated on several occasions, the Jones Act and the LHWA are mutually exclusive compensation regimes . . . " at 115 S.Ct. 2183.

only after a Court of competent (general) jurisdiction makes a final determination of status. All else is prelude. The Ninth Circuit's facile response to this issue is that there is mutual exclusivity as long as there is no double recovery. In other words, as long as Mr. Papai's potential Jones Act verdict can be reduced by the LHWCA benefits previously paid, all is well. *Amicus curiae* would urge this Court to grant the writ in order to adopt the views expressed by the Fifth and Second Circuits on this issue. In *Sharp v. Johnson Bros. Corp.*[12] and in *Hagens v. United Fruit Co.*,[13] both Circuits concluded that a determination by an Administrative Law Judge of coverage under the LHWCA is dispositive of the claimant's status as a non-seaman and that such determination precludes the pursuit of a Jones Act case. This is a more reasoned approach to the issue. It gives effect to the administrative proceedings and promotes judicial economy. Further, it provides incentive to the parties to the LHWCA proceeding to bring the matter to conclusion in a timely manner.

It is doubtful that Congress considered mutual exclusivity to be reducible to an arithmetic calculation. Rather, it is more likely that Congress was mindful of the trade-off made between employer and employee in the LHWCA and virtually every other workers' compensation regime. Maritime workers covered by the LHWCA were granted no-fault benefits in exchange for bestowing on employers immunity from suits for damages. The Ninth Circuit's opinion below in effect allows a claimant

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[12] 973 F.2d 423 (5th Cir. 1992).

[13] 135 F.2d 843 (2d Cir. 1943).

to collect no-fault compensation while pursuing a suit for damages.

Amicus curiae is in the business of insuring employers for risks imposed by the compensation regimes discussed above. It has, through its insurance policies, contractual relationships with its insureds. Its business livelihood depends, in part, on its ability to administer and adjust employee injury claims in an efficient and economic manner. This ability is adversely impacted by the rule imposed by the Ninth Circuit in this case. This rule imposes unnecessary overhead on the compensation system, an obvious example of which is the cost associated with Mr. Papai's Jones Act claim. In order to protect their insureds, *amicus curiae* must litigate all Ninth Circuit LHWCA claims that present the possibility of a subsequent Jones Act case. Below, the employer and employee herein were forced to take opposite positions in each forum, simply in order to put status in issue. This is wasteful.[14] It is far more sensible to accord finality to a determination of LHWCA coverage as made by the Administrative Law Judge.

Presently, the LHWCA provides a maximum weekly compensation rate of $782.44.[15] In practice, LHWCA carriers (*amicus curiae*) and employers often reach lump sum settlement agreements with LHWCA claimants.[16] With this high compensation rate, these settlements frequently

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[14] As the Appendices to the Petition reflect, both employer and employee were forced to retain different counsel, from different firms, for the LHWCA and Jones Act actions.

[15] 33 U.S.C. § 906.

[16] 33 U.S.C. § 908(i).

involve large sums. It is now quite difficult to secure such settlements in the Ninth Circuit, as any such payment would not produce a final disposition of all claims between the parties. In fact, such a settlement would have the opposite effect. It would fund the Jones Act litigation. Further, LHWCA employers are frequently insured by multiple carriers, with different carriers on the LHWCA and Jones Act risks. While application of credit may be as routine as the Ninth Circuit suggests, reimbursement between the carriers may not be. Rather, this duality of insurance fosters conflict, dispute and even more litigation, rather than automatic reimbursement. What sounds simple in theory is actually quite complex in practice.

Lastly, the Ninth Circuit has created a situation where a bona-fide injured employee could lose on the status issue in both the civil and LHWCA arenas and thereby be deprived of any benefits for a clear work related injury. In order to avoid this harsh result, certain maritime workers will now file claims in yet a third forum seeking state workers' compensation benefits.[17] This will further increase the administrative and judicial burden as well as the system overhead.

II. SEAMAN STATUS IS NOT PORTABLE

Amicus curiae submit that the second prong of the opinion below is sufficient, unto itself, to warrant granting the Petition. As noted by Judge Poole in his dissent in the opinion below, the Ninth Circuit has modified this

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[17] In many cases, this will result in the retention of a third set of lawyers in the case.

Court's test for seaman status, as enunciated in *Gizoni* and *Latsis*, to the extent that it no longer requires "an employment related connection to a vessel in navigation." As matters now stand, all that is required is a 'prior employment related connection to a vessel.' This expansion of the fleet seaman doctrine to include, within the 'fleet', vessels owned by prior, different employers has the potential of exposing land-locked employers to Jones Act liability.

The 'fleet seaman' doctrine finds its genesis in the river trade of the Midwest, where short voyages allowed owners to assign seaman to different tugs and towboats on an almost daily basis. In order to avoid the harshness of the "more or less permanent connection to a vessel in navigation" test set forth in *Offshore Co. v. Robison*,[18] the Courts fashioned the fleet seaman test to accommodate seamen who owed an allegiance to a fleet of vessels rather than to one particular vessel. See *Guidry v. Continental Oil Co.*[19] and *Barrett v. U.S.A. Chevron, Inc.*[20] However, in each instance, the 'fleet' was under common ownership or control.

Now, for the first time, the Ninth Circuit instructs that plaintiff's employment with prior employers is relevant to the seaman status test. The 'fleet' has been redefined to include all the vessels owned by all the different employers that hire workers from the employee's union. This leads to the conclusion that,

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[18] 266 F.2d 769 (5th Cir. 1959).

[19] 640 F.2d 523 (5th Cir. 1981).

[20] 781 F.2d 1067 (5th Cir. 1986) (en banc).

unless a new employment situation amounts to a permanent change of status, the seaman carries his seaman status on his back from job to job. This regardless of the nature of work performed for the new employer.

Around the turn of the century, employers and employees bargained away certain rights in order to bring about workers' compensation regimes in most states. Among the rights bargained away was the employees' right to sue the employer for damages for work related bodily injury. In return, employers agreed to compensate employees for work-related injuries, regardless of fault. The decision of the Ninth Circuit in this case undermines the very core of this bargain, by restoring the right to sue to certain employees. This new group of favored employees are those who were once seamen and who continue to work out of the same union.

Under this new 'fleet seaman' test, there is no requirement that the employee have a work-related connection to a vessel for his current employment. For example, under the Ninth Circuit analysis, Mr. Papai would still be eligible for seaman status if he had been employed by a sub-contractor hired by Harbor Tug & Barge Co. to paint PT. BARROW. To continue the example, if the painting sub-contractor hires day workers out of Mr. Papai's union, Mr. Papai would be eligible for Jones Act status. The painting sub-contractor need not own or control a single vessel, for, under the new Ninth Circuit rule, it would be deemed to have some undefined form of ownership or control of the various vessels belonging to the other employers that hire out of the same union.

Amicus curiae submit that this unwarranted expansion of the fleet seaman doctrine can and will produce harsh results. Employers will not hire seamen for short duration non-seafaring jobs, jobs exactly like the one Mr. Papai was doing for Harbor Tug & Barge Co., simply because they will be unwilling to risk exposure to claims in multiple forums. In this day and age, with the American Merchant Marine in decline and with the foreign flagging and crewing of American vessels, the maritime industry does not need a further burden to employment. Nor does it deserve increased liability exposure.

CONCLUSION

The Ninth Circuit, with its opinion below, is on a different tack, sailing away from the rest of the fleet. For the reasons set forth above, this Court should grant Harbor Tug & Barge Co.'s Petition for a Writ of Certiorari.

Dated: July 25, 1996

Respectfully Submitted:

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No. 95-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF THE SHIPBUILDERS COUNCIL OF AMERICA AND SOUTHWEST MARINE, INC. IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1621

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the Shipbuilders Council of America ("SCA") and Southwest Marine, Inc. move for leave to file the Brief *Amici Curiae* in support of Petitioner, Harbor Tug and Barge Company.

The Petitioner has consented in writing to the filing of a Brief *Amici Curiae* on its behalf, and a letter of consent has been filed with the Clerk of this Court. Respondent has not so consented.

The SCA is a not-for-profit trade association whose member companies are shipbuilders, shiprepairers, and component manufacturers located in all sections of the country.

Together SCA member companies employ over 20,000 workers, all but a handful of whom are harbor workers—shipbuilders and shiprepairmen—subject to the Longshore and Harbor Workers' Compensation Act. On any given day a portion of this land-based workforce is employed on a ship, some in conjunction with a floating device, barge or similar platform moored to the ship or a pier in order to better carry out construction or repair assignments.

These employees now know that they can file both a LHWCA claim and a Jones Act claim against their employer. One employer, Southwest Marine, Inc., an SCA member, has vigorously challenged one such claim, which has been to this Court on two occasions. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138 (9th Cir. 1995), cert. denied, —— U.S. —— (Oct. 30, 1995).

Southwest Marine, Inc., and all of the other SCA members have a vital stake in the two questions now before the Court, and believe that they will be confronted routinely with Jones Act claims and LHWCA claims from those employees injured while working from, on, or otherwise in conjunction with these floating devices, unless the Ninth Circuit is reversed on both questions.

Accordingly, *Amici* respectfully move for leave to file the attached Brief *Amici Curiae* in support of Petitioner.

Respectfully submitted,

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BRIEF AMICI CURIAE ON BEHALF OF THE SHIPBUILDERS COUNCIL OF AMERICA AND SOUTHWEST MARINE, INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

The SCA is a not-for-profit trade association whose member companies are shipbuilders, shiprepairers, and component manufacturers located in all sections of the country.

Together SCA member companies employ over 20,000 workers, all but a handful of whom are harbor workers—shipbuilders and shiprepairmen—subject to the Longshore and Harbor Workers' Compensation Act. On any given day a portion of this land-based workforce is employed on a ship, some in conjunction with a floating device, barge or similar platform moored to the ship or a pier

in order to better carry out construction or repair assignments.

These employees now know that they can file both a LHWCA claim and a Jones Act claim against their employer. One employer, Southwest Marine, Inc., an SCA member, has vigorously challenged one such claim, which has been to this Court on two occasions. *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81 (1991); *Gizoni v. Southwest Marine, Inc.,* 56 F.3d 1138 (9th Cir. 1995), cert. denied, —— U.S. —— (Oct. 30, 1995).

Southwest Marine, Inc., and all of the other SCA members have a vital stake in the two questions now before the Court, and believe that they will be confronted routinely with Jones Act claims and LHWCA claims from those employees injured while working from, on, or otherwise in conjunction with these floating devices, unless the Ninth Circuit is reversed on both questions.

SUMMARY OF ARGUMENT

Notwithstanding the fact that an injured maritime employee is allowed to seek both LHWCA benefits and Jones Act relief simultaneously as this Court has recently allowed, the Congressional scheme for adjudication of LHWCA benefits requires the Department of Labor (DoL) to determine the status of a claimant as between land-based harbor worker and seaman. Once this question of status has been adjudicated by the DoL and benefits awarded, as Congress intended with enactment of the LHWCA in 1927, the question must be considered settled and the rules of issue preclusion must be applied to any subsequent Jones Act claim.

The Ninth Circuit's decision to the contrary allows a successful claimant to collaterally attack a DoL order awarding benefits. Its rule effectively centers all judicial power over maritime status in the district courts, a concentration of jurisdiction never intended by Congress. At

best this is an abuse of process and a waste of judicial resources. At worst it could result in some very absurd and unfair results clearly not intended by the Congress.

The decision below also blurs the distinction between Jones Act seamen and land-based harbor workers that this Court recently set forth in *Chandris v. Latsis,* and rejects the fleet seaman limitation accepted by two other circuits, and apparently accepted by this Court as well in *Chandris,* in favor of a broad industry-wide employment relationship test.

This Court has already considered and rejected an industry-wide employment relationship test for status, albeit in the LHWCA context involving land-based longshoremen. As the LHWCA and Jones Act remedies are mutually exclusive and the terms seaman/master/crewmember interchangeable, and status determinations under the two Acts involve the same considerations, the circuit court's industry-wide employment relationship test for status under the Jones Act must be rejected as well.

ARGUMENT

Both the Jones Act, 46 U.S.C. App. § 688, and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, were enacted by Congress pursuant to its constitutional authority over admiralty matters and its responsibility to maritime workers.[1]

---

[1] The Constitution vests jurisdiction over admiralty and maritime matters with the federal courts, Art. III, Sec. 2, Cl. 1. This Court has acknowledged that the necessary and proper clause, Art. I, Sec. 8, gives Congress the paramount power to alter maritime law, and the Congress has in fact done so with both Acts. The Jones Act overturned this Court's opinion in *The Osceola*, 189 U.S. 158 (1903); later the LHWCA was enacted to address this Court's opinions that state compensation statutes could not constitutionally reach injuries incurred upon the navigable waters of the United States, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and

Each Act provides a distinct remedy to a different class of injured maritime worker. The Jones Act supplements the traditional common law maritime remedies of unseaworthiness and maintenance and cure available to an injured seaman with a cause of action for negligence against his employer. *Chandris, Inc.* v. *Latsis,* —— U.S. —— (1995). The LHWCA, as amended, provides fixed and certain benefits to those injured land-based maritime workers who fall within the scope of the Act in exchange for limited employer tort liability. *Morrison-Knudsen Construction Co. v. Director, OWCP,* 461 U.S. 624 (1983). Together they are intended to leave no seams in maritime coverage.

Although the terms of the Jones Act do not define the limits of seaman status, the LHWCA specifically excludes from its reach, *inter alia,* a "master or member of a crew," 33 U.S.C. § 902(3)(G), a term which this Court has held is coextensive with the term "seaman," used to determine Jones Act jurisdiction. *McDermott Inc. v. Wilander,* 498 U.S. 337 (1991).

Jones Act claims rest entirely on the status of the claimant, while LHWCA claims rest on both the status of the claimant and the situs of the injury.[2] The question of status under either Act is a mixed question of law and fact. *Chandris, Inc. v. Latsis,* —— U.S. —— (1995). Slip Opinion at 21. Both Acts impose liability on the injured worker's employer.

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that Congress could not constitutionally delegate regulation of federal maritime jurisdiction to the states, *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920). Congress subsequently tailored the LHWCA to fill the gap in injury coverage between the Jones Act and state compensation statutes, i.e., to recompense injured land-based maritime employees.

[2] The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, extended LHWCA jurisdiction shoreward of the so called *Jensen* line. Consequently, Congress placed a situs limitation on this extension. 33 U.S.C. § 903(a).

Each Act is designed to recompense its intended beneficiaries for injuries falling within its jurisdictional limitatons. The courts have long held that a maritime employee is not entitled to remedies under both Acts.[3] Thus the LHWCA and Jones Act remedies are considered mutually exclusive. *Swanson v. Marra Bros., Inc.,* 328 U.S. 1 (1946).

I. THE NINTH CIRCUIT'S VIEW OF ISSUE PRECLUSION IS UNSUPPORTABLE AND MUST BE REJECTED.

A. The Ninth Circuit's Disregard Of The Rules Of Issue Preclusion Is Incompatible With The Jurisdictional Scheme Provided By Congress.

Besides providing distinct and mutually exclusive remedies, the two Acts divide jurisdiction over maritime work-related injury claims and provide substantially different approaches to the adjudication of claims filed under the two Acts. Under the Jones Act, federal district courts are assigned exclusive jurisdiction over claims from seamen while, under the LHWCA, the DoL is assigned exclusive jurisdiction over claims from land-based maritime workers. Jones Act claims are entitled to a jury trial in the appropriate U.S. district court, while LHWCA claims are decided through an administrative adjudication conducted by the DoL.[4]

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[3] The LHWCA provides that any recompense shall be credited against any Jones Act recovery. 33 U.S.C. § 903(e). Thus, although claimants are permitted to seek both remedies, *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81 (1991), double recovery is not permitted.

[4] The Jones Act incorporates the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51,: Originally the LHWCA provided for an administrative hearing and fact finding by a deputy commissioner with review by a district court. Congress substantially revised this process with enactment of the 1972 Amendments. See *Caputo,* 432 U.S. 249 at 254, n.3. These revisions do not alter present DoL jurisdiction or fact finding authority.

Notwithstanding this split jurisdiction between the courts and an administrative agency, Congress delegated virtually identical fact finding authority to the two triers of fact.[5] Congress authorized district courts to determine whether or not a claimant seeking Jones Act relief has the requisite seaman status to fall within the reach of this Act. Congress also delegated authority to the DoL to determine whether a LHWCA claimant has the status of a land-based harbor worker or does not by virtue of having the status of a master or member of a crew.[6] A positive finding that the claimant is a master or member of a crew, i.e., a Jones Act seaman, negates LHWCA coverage and remedies. Conversely, a positive finding that a claimant is a covered harbor worker settles the question of the claimant's Jones Act seaman status as well.

The LHWCA requires this particular fact finder to make just such a determination, as indeed the ALJ did with respondent's LHWCA claim.

The significance of the DoL's jurisdiction and Congressional expectations concerning this jurisdiction can be gleaned from the legislative history of the LHWCA. Congress considered a remedial scheme that would not have delegated to the DoL the power to make any determination of status between the two classes of maritime employee. The House Judiciary Committee considered and reported legislation to the House floor which added a provision to the Senate-passed legislation that would have given LHWCA benefits to seamen, in addition to

[5] A district court is certainly within its discretion to find that a claimant is not a covered Jones Act seaman by virtue of falling within the reach of the LHWCA, but is without jurisdiction to order LHWCA benefits. Likewise, the DoL is without jurisdiction to award Jones Act compensation even if it finds that a LHWCA claimant falls outside the scope of the Act by virtue of being a master or member of a crew.

[6] Of course a third determination is also possible, i.e., that a claimant is not a maritime employee and has neither status.

their other maritime remedies. See House Report No. 1767, 69th Congress, 2d Sess. to accompany S. 3170 (January 14, 1927). Had this provision been enacted, any determination of status—as between the two classes of maritime workers—by the DoL would, of course, be completely unnecessary.

But the Judiciary Committee's proposed amendment was later deleted on the House floor in favor of the split status approach that finally was enacted. This split is very significant for what it requires the administrative fact finder to do: determine the status—as between the two classes of maritime employee—of all claimants. Even if the question of status should not be put at issue in the administrative proceeding, a statutory prerequisite to the award of benefits by the DoL is that only a claimant with the status of a land-based maritime employee may receive LHWCA benefits. Any benefits awarded by a DoL order can only be predicated on the fact that the claimant has the necessary status of a land-based maritime worker.

Clearly, Congress fully expects this fact finder to make a status determination in each and every claim for benefits, even if it means running the risk of proceeding simultaneously with, or in advance of, a possible Jones Act claim in district court.

Recently, this Court ruled that an injured worker receiving LHWCA benefits without an administrative award is not barred from subsequently seeking to prove seaman status in order to obtain Jones Act relief, "because the question of coverage has never actually been litigated." *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).

Such is not the case below. After due consideration of the respondent's LHWCA claim, a DoL administrative law judge entered an order finding that the respondent is covered by the LHWCA and is not a master or member

of a crew, i.e., a seaman. This order was not appealed to the Benefits Review Board, and thus it has become a final order of the DoL.

As noted above, the DoL can award benefits only to those claimants falling within its Congressionally delegated jurisdiction. Land-based status is a prerequisite of DoL jurisdiction and award of benefits, and once a DoL fact finding determination and award of benefits is made, it must cut off any right of the claimant to proceed with or initiate litigation of a Jones Act claim in district court.[7] The normal rules of collateral estoppel must apply, as indeed two other circuit courts have recognized. *Sharp v. Johnson Brothers Corporation*, 973 F.2d 423 (5th Cir. 1992); *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991); *Hagens v. United Fruit Co.*, 135 F.2d 842 (2d Cir. 1943).

The Second Circuit also recognizes that estoppel principles apply in the context of a state compensation award followed by a Jones Act claim, *Roth v. McAllister Bros., Inc.*, 316 F.2d 143 (2nd Cir. 1963) (an employer who takes the position in a state compensation proceeding that a claimant is a seaman is estopped from claiming otherwise in a subsequent Jones Act proceeding). Indeed, even the Ninth Circuit recognizes judicial estoppel principles in a similar context.[8]

[7] *Amici*, as of this writing, do not know whether or not the United States will appear as an *Amicus* to this proceeding, but point out that this view of issue preclusion is entirely consistent with that taken by the United States in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). See Brief *Amicus Curiae* of the United States, p. 23.

[8] In a case decided *after* the case under review, the Ninth Circuit held that an administrative award made under a claim of total disability to a state compensation board bars a federal district court from finding otherwise in a subsequent federal cause of action, although not a Jones Act claim, in which the claimant's position was inconsistent with that taken in the administrative proceeding. *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996). It is difficult to reconcile this decision with the circuit court's decision below.

Amici recognize that the same reasoning undoubtedly holds true should a district court enter judgment in a claimant's favor before the administrative process enters an order. Congress provided this dual remedial scheme, and it only works if one fact finder respects the factual conclusions of the other. The Ninth Circuit's rule is inherently incompatible with the Congressional remedial scheme, because it effectively centers all judicial power over maritime status—both Jones Act seamen and LHWCA covered harbor workers—in the district courts. Congress clearly never intended this consolidation of judicial power, and to allow it will only result in permitting some very questionable results.

B. The Ninth Circuit's View Leads To Results Neither Intended By Congress Nor Appropriate For A Sound Judicial System.

Under the Ninth Circuit's decision, the law of unintended consequences will bring results that are certain to thwart the intent of Congress and induce chaos into the legal system.

First, Congress intended, and the LHWCA so provides, that LHWCA benefits be paid quickly and voluntarily whenever possible. 33 U.S.C. § 914. Congress wanted as few claims as possible to run afoul of the administrative process. The legal regime actually works as intended; approximately 90% of claims are currently not controverted by the employer, according to DoL estimates, and the injured party receives recompense in short order, when it is most needed.

Congress, for like reasons, added a provision to the Act in 1984 permitting the parties to settle claims, even deeming DoL approval if both parties are represented by counsel. 33 U.S.C. § 908(i). Should the decision below stand, it will impair the prospect for quick and fair settle-

ments because employers will have no incentive to settle a claim, and thus fund a subsequent Jones Act suit.

Second, Congress clearly intended, and the LHWCA so provides, that review of a DoL final order awarding benefits is to the appropriate court of appeals. 33 U.S.C. § 921(c). But under the Ninth Circuit's view, a claimant who receives an award of LHWCA benefits by the DoL will also be permitted to trigger a second "review" merely by filing a Jones Act claim in a U.S. district court. Unlike appellate court review of a DoL order, this "review" is actually a *de novo* collateral attack which may be proceeding simultaneously with a § 21(c) appeal initiated by the employer.

Obviously, neither the LHWCA nor the Jones Act authorizes a U.S. district court to consider any aspect of an otherwise lawful DoL order, or to overturn an administrative finding of status by entertaining a collateral attack to an award of LHWCA benefits. At best, permitting collateral attack will only confuse the judicial process by making conflicting decisions a real possibility. At worst, it could produce one of the most absurd judicial results conceivable: a district court precluded from invoking estoppel principles when considering a collateral attack on a decision of its superior circuit court.

This is not as far-fetched as it may seem. Should a claimant seek Jones Act relief after a DoL award of benefits is made, under the circuit court's decision, the district court appears to be just as free to ignore an appellate decision upholding this award as it is free to ignore the DoL's award. There is no logical reason under the Ninth Circuit's collateral estoppel theory to treat a circuit court's LHWCA decision any differently than a DoL order.

And third of all, Congress clearly intended that all injured martime employees are to be recompensed under one statute or the other for their injuries. But it is conceivable, under the Ninth Circuit's decision, that an injured worker could file claims under both statutes but

receive nothing. For example, the DoL could conclude that the claimant is a master or member of a crew and deny LHWCA benefits. Later a jury could conclude the opposite, leading to this unintended result.

II. THE NINTH CIRCUIT'S STATUS TEST HAS NO BASIS IN MARITIME LAW AND MUST BE REJECTED.

A. The Ninth Circuit's Status Test Is No More Than An Industry-Wide Employment Relationship Test Which Two Other Circuits Have Rejected.

Jones Act liability rests on an injured claimant's status as a seaman. *Latsis*, Slip Opinion at 13. The courts have long held that the question of seaman's status is determined by the employee's relationship to a vessel in navigation or to an identifiable fleet of such vessels under common control. See *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1985); *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3rd 1247 (3rd Cir. 1994). This Court recently set forth a two part test outlining the minimum connection to a vessel, or to an identifiable group of such vessels, necessary for seaman status. See *Latsis*, Slip Opinion at 20. (See II-B, *infra*).

Once seaman status is established, liability for employment related injury flows to his/her employer as a result of the employer-employee relationship. "It is axiomatic that an employer/employee relationship is essential before liability may be imposed under the Jones Act." *Stamoulos v. Howland Panama S.A.*, 610 F. Supp. 454, 456 (E.D. La. 1985).

Both the Fifth and Third Circuits, in expressing their respective opinions concerning the fleet vessel doctrine, expressly limited fleet-based liability to the fleet owned or operated by the claimant's employer. "We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard." *Barrett* at 1074: "The key to the fleet seaman doctrine is that

the seaman maintain the employment relationship with the same employer. The term 'fleet' refers to the fleet of vesels owned by the employer, not the fleet of vessels on which the employee has worked." *Reeves* at 1256. This Court appears to have found the Fifth Circuit's limitation reasonable. *Latsis*, Slip Opinion at 21.

In rejecting this line of authoritative reasoning, the court below stretched the accepted bounds of seaman status well beyond a seaman's substantial relationship to a vessel or a group of vessels owned or operated by his employer. Rather, the court found that status may be based merely on a claimant's ongoing relationship with all of those employers who use the multi-employer hiring hall from which he was hired.[9] The court based its reasoning on the belief that, since some of these employers did, indeed, utilize the claimant's services as a Jones Act seaman from time to time, the claimant's past employment relationship to the industry is sufficient to confer seaman status, even if, at the time of the injury the claimant was not employed with a substantial relationship to a vessel in navigation, but rather as a transitory harbor worker temporarily on a vessel to scrape and paint it.

The Ninth Circuit's test for seaman status is much more expansive than that permitted by the Fifth Circuit's fleet vessel limitation. It is in fact no limitation on status at all, but an industry-wide employment relationship test.

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[9] The Ninth Circuit's holding rests on the following premise: "There would appear to be no reason that a group of employers who join together to obtain a common labor pool on which they draw by means of a hiring hall (in this case, the Inland Boatman's Union hiring hall) should not be treated as a common employer for purposes of determining a maritime worker's seaman status. . . In short, all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, *as well as work performed for other employers during the relevant time should be considered in making the determination.*" *Papai v. Harbor Tug*, 67 F.3d 203, 206 (emphasis added).

B. The Ninth Circuit's Status Test Blurs The Distinction Between Land-Based Maritime Workers And Jones Act Seamen Set Forth In *Latsis*, Thus Improperly Extending Jones Act Status To Land-Based Maritime Workers Who Congress Clearly Intended To Exclude From The Jurisdiction Of The Jones Act.

As noted above, with enactment of the LHWCA in 1927, Congress distinguished one class of maritime employee—a master and members of a crew—from land-based maritime workers and excluded it from LHWCA jurisdiction. Subsequently the federal courts have come to recognize that the term "master and members of a crew" is coextensive with the term "seaman" who falls within the scope of the Jones Act. See note 12, *infra*.

The land-based maritime occupations that Congress distinguished from seamen include longshoremen and harbor workers. This latter category, in turn, includes shipbuilders, shiprepairmen and ship-breakers. 33 U.S.C. § 902(3). This section of the LHWCA also specifically excludes certain classes of employees that Congress found ought not to be subject to U.S. maritime jurisdiction and statutory remedies.

Congress intended to make as sharp a distinction as possible between the two classes of maritime workers in excluding seamen from the reach of the LHWCA. (See I-A). Since enactment of the LHWCA in 1927, the federal courts have spent considerable energy wrestling with the problem of defining exactly what job attributes define a Jones Act seaman, culminating in this Court's recent opinion in *Chandris, Inc. v. Latsis*, —— U.S. —— (1995).

Latsis enunciates a two part test for seaman status, the first of which ("an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission") is a rather wide open gate establishing eligibility, and the second of which ("connection to a vessel

in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature") is a narrow funnel limiting Jones Act coverage to those seamen whom Congress intended to be covered by the Act.

It is clear that this Court intends that the second part of this test fully reflect the Congressional purpose of the Jones Act:

> "The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Latsis* at 21.

Amici submit that an employee hired only to maintain a ship or tug boat moored or at anchor on a daily or other temporary basis, and not a part of the ship's crew or a permanent employee of the fleet operator with a substantial connection to one or more vessels in his employer's fleet, completely fails both elements ("substantial in terms of both *duration and nature*") of the second part of the *Latsis* test—as a matter of law. Harbor workers with a connection to a vessel this insubstantial have no real possibility of ever being exposed "regularly to the perils of the sea" as envisioned by this Court's jurisprudence, and ought not be allowed to prove status to a jury.[10]

[10] In *Latsis* this Court stated that, as to the temporal element of this test, district courts are justified in granting summary judgment or a directed verdict "where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to [a vessel] in navigation [.]" Slip opinion at 24. *Amici* submit that applying this same observation to the second element, i.e., "substantial in terms of . . . nature," and encouraging district courts to treat claims inadequate on this point in a like fashion would go a long way toward clarifying the Jones Act/LHWCA status conundrum still confusing the courts.

The decision below simply eviscerates the second prong of the *Latsis* test by allowing an industry-wide Jones Act status test to trump the intent of Congress, as interpreted by this Court, i.e., that an essential requirement of seaman status is a substantial connection to a vessel in terms of both duration *and* nature. It completely blurs the distinction between Jones Act seaman and LHWCA covered harbor workers, and entangles the two remedial schemes created by Congress. Unless this Court clearly rejects the Ninth Circuit's status test, *Amici* believe that numerous land-based harbor workers will be able to claim seaman status and seek Jones Act relief.

Additionally, the decision below opens the door to imposing Jones Act liability on every maritime employer for a claimant's past status. While it does recognize that Jones Act liability runs only to the injured claimant's employer and not to the maritime industry in general or to any given group of such employers within a specific hiring hall relationship, this limitation is illusory at best. At the very least, the Ninth Circuit's industry-wide status test effectively places Jones Act liability on the particular employer (of the group of employers utilizing the hiring hall) who employed the claimant at the point of the injury, regardless of claimant's status at the point of injury. Thus this employer becomes liable solely because of the claimant's past employment history.

Equally troubling, the circuit court's analysis potentially opens the door to spurious allegations of liabiilty that could ensnare *any* employer in the entire maritime industry.[11] Should this Court find it acceptable, shipbuilders

[11] Seaman status appears to be an open ended proposition under the Ninth Circuit's test ("If the type of work a maritime worker customarily performs would entitle him to seaman status. . ."). *Amici* are fearful that any maritime employer, such as a shipbuilder or shiprepairer, whose employees are generally subject to the LHWCA, some of whom work as needed on a ship or a floating barge or similar device fixed to a pier or ship, will be victimized by the Ninth Circuit's status test. In addition, the Ninth Circuit's

and shiprepairers believe that they will be routinely besieged with Jones Act claims from their land-based employees injured while temporarily aboard a ship or a floating platform to perform their assigned ship construction or repair duties. Thus the Ninth Circuit's status test does indeed impose broad industry-wide Jones Act liability.

C. This Court Rejected An Industry-Wide Employment Relationship Test For Status In The LHWCA Context, And Must Reject It In The Jones Act Context As Well.

The court below rested its decision on the premise that membership in a maritime union which sends members to employers through a multi-employer hiring hall, on an as needed basis, to perform many different jobs including that of a seaman and, as below, general maintenance work on ships, is sufficient to confer Jones Act status. According to the Ninth Circuit, it is the claimant's past overall employment relationship to other employers in the industry that determines seaman status, and not his employment relationship to his employer at the time of the injury.

This Court rejected a virtually identical status argument made in the LHWCA context during its initial review of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576. These amendments substantially revised LHWCA status, extending it shoreward. In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, (1977), a multi-employer hiring hall union argued to the Court that status should be based specifically "on the employment relationship between unit employees and their stevedore and terminal employers []" with the only relevant question to the determination of status being "whether or not the injury was an outgrowth

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open ended time frame ("the relevant time period") is vague to the point of giving no assurance whatsoever of a reasonable temporal limitation.

of [this] employment relationship." See Brief *Amicus Curiae* of the International Longshoremen's Association p. 9.

The Court saw fit to address *Amicus*' argument and dismissed the suggested test as not proper in light of the purposes of the LHWCA, with the following comment: "We find consideration of the purposes [of the recently enacted status provisions] more enlightening than looking simply at whether respondents belong to [a union] . . . The vagaries of union jurisdiction are unrelated to the purposes of the Act." 432 U.S. 268, n. 30.

Amici suggest that, as the Jones Act and the LHWCA share a common remedial purpose, although focused at the two different classes of maritime employee noted above, and as seaman status under the two Acts is hopelessly entwined,[12] the same rational that led the Court to reject an industry-wide status test under the LHWCA must be applied to the question of seaman status as well. Rejection in the Jones Act context is as warranted as it is in the LHWCA context.

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[12] "Master or member of a crew is a refinement of the term seaman in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus it is odd but true that the key requirement for Jones Act coverage now appears in [the LHWCA]." *McDermott International v. Wilander*, —— U.S. —— (1991), Slip Opinion at 9-10, internal quotations omitted.)

CONCLUSION

The Ninth Circuit's views are unsupportable for all of the aforementioned reasons. Therefore, *Amici* respectfully submit that the decision below must be reversed on both questions.

Respectfully submitted,

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No. 95-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HARBOR TUG AND BARGE COMPANY,
Petitioner,

vs.

JOHN PAPAI, ET UX,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 9, 1996
CERTIORARI GRANTED OCTOBER 1, 1996

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The following opinions and orders of the United States Court of Appeals for the Ninth Circuit, the U.S. District Court for the Northern District of California, and the U.S. Department of Labor and relevant statutes have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-90-0111-CAL

JOHN PAPAI, JOANNA PAPAI,
Plaintiffs,
vs.
HARBOR TUG & BARGE COMPANY,
Defendant.

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1/12/90	1	COMPLAINT (Summons(es) issued) (tl) [Entry date 04/23/91]
2/12/90	6	ANSWER by defendant Harbor Tug & Barge C to complaint [1-1] (tl) [Entry date 04/23/91]
5/24/90	20	FIRST AMENDED COMPLAINT [1-1] by plaintiff John Papai, plaintiff Joanna Papai; jury demand (tl) [Entry date 04/23/91]
6/19/90	24	ANSWER by defendant Harbor Tug & Barge C to first amended complaint [20-1] (tl) [Entry date 04/23/91]
9/14/90	34	ORDER by Judge Charles A. Legge dismissing case pending the resolution of the interim appeal from the partial summary judgment granted in favor of defendants & against plaintiffs on 8/17/90, all further proceedings are stayed & the clerk is directed to remove this case from active list (cc: all counsel) (Date Entered 9/19/90) (tl) [Entry date 04/23/91]

DATE	NR.	PROCEEDINGS
4/18/91	35	CLERK'S NOTICE; Status conference 5/10/91 @ 11:00 am (tl) [Entry date 04/23/91]
4/19/91	36	ORDER by Judge Charles A. Legge Case reopened (cc: all counsel) (Date Entered 4/23/91) (tl) [Entry date 04/23/91]
5/1/91	37	STATUS REPORT by plaintiff John Papai, plaintiff Joanna Papai (tl) [Entry date 05/06/91]
5/3/91	38	STATUS REPORT by defendant Harbor Tug & Barge C (tl) [Entry date 05/07/91]
5/10/91	39	MINUTES: (C/R none); Status conference held.; Status conference continued to 7/12/91 @ 11:00am;, referring case to Magistrate for settlement (tl) [Entry date 05/16/91]
5/17/91	40	LETTER dated 5/15/91 from Thomas Boyle from John Papai, Joanna Papai re: settlement conference before Judge Zirpoli @ 11:00am on 5/29/91. (tl) [Entry date 05/21/91]
7/3/91	41	STATUS CONFERENCE STATEMENT by defendant Harbor Tug & Barge C (tl) [Entry date 07/05/91]
7/12/91	42	MINUTES: (C/R none); Status conference set for 1/3/92 @ 11:00am (tl) [Entry date 07/16/91]
12/23/91	43	STATUS CONFERENCE STATEMENT by plaintiff (mp) [Entry date 12/26/91]
12/26/91	44	STATUS CONFERENCE STATEMENT by defendant Harbor Tug & Barge (mp) [Entry date 12/27/91]
1/3/92	45	MINUTES: (C/R not reported) Status conference held; Discovery cutoff 5/30/92; Pre-trial conference 7/30/92 at 3:00pm; Trial 8/31/92 at 8:00pm and to lift stay (mp) [Entry date 01/08/92]

DATE	NR.	PROCEEDINGS
1/28/92	46	MOTION by defendant Harbor Tug & Barge C to confirm summary adjudication that plaintiff John Papai was not a seaman with Notice set for 2/28/92 at 9:30am (mp) [Entry date 01/30]92]
1/28/92	47	MEMORANDUM by defendant Harbor Tug & Barge C in support of motion to confirm summary adjudication that plaintiff John Papai was not a seaman [46-1] (mp) [Entry date 01/30/92]
1/28/92	—	RECEIVED Order (defendant Harbor Tug & Barge C) re: [46-1] (mp) [Entry date 01/30/92]
2/14/92	48	STATEMENT of undisputed facts by plaintiff John Papai, plaintiff Joanna Papai (as) [Entry date 02/18/92]
2/14/92	49	MEMORANDUM by plaintiff John Papai, plaintiff Joanna Papai in opposition to defendants points and authorities in support of motion to confirm summary adjudication (as) [Entry date 02/18/92]
2/14/92	50	DECLARATION by Thomas J. Boyle on behalf of plaintiff John Papai, plaintiff Joanna Papai (as) [Entry date 02/18/92]
3/19/92	51	REPLY by defendant Harbor Tug & Barge C to response to motion to confirm summary adjudication that plaintiff John Papai was not a seaman [46-1] (mp) [Entry date 03/20/92]
3/19/92	52	DECLARATION by Eric Danoff on behalf of defendant Harbor Tug & Barge C re

DATE	NR.	PROCEEDINGS
		motion to confirm summary adjudication that plaintiff John Papai was not a seaman [46-1] (mp) [Entry date 03/20/92]
3/27/92	53	MINUTES: (C/R Ray Linkerman) granting motion to confirm summary adjudication that plaintiff John Papai was not a seaman [46-1] (mp) [Entry date 04/01/92]
4/1/92	54	DESIGNATION OF EXPERT WITNESS(ES) submitted by plaintiffs (mp) [Entry date 04/06/92]
4/1/92	55	DESIGNATION OF EXPERT WITNESS(ES) submitted by defendant (mp) [Entry date 04/06/92]
4/6/92	56	ORDER by Judge Charles A. Legge granting motion to confirm summary adjudication that plaintiff John Papai was not a seaman [46-1] (Date Entered: 4/8/92) (cc: all counsel) (mp) [Entry date 04/08/92]
6/29/92	57	CLERK'S NOTICE; Pretrial conference reset 8/13/92 at 3:00pm (mp) [Entry date 07/01/92]
7/31/92	58	PRETRIAL STATEMENT by plaintiff John Papai, plaintiff Joanna Papai (mp) [Entry date 08/04/92]
8/3/92	59	PRETRIAL CONFERENCE STATEMENT by defendant Harbor Tug & Barge (mp) [Entry date 08/05/92]
8/13/92	60	TRIAL MINUTES: (C/R Larry White) pretrial conf held 8/13/92; All motions hearing 8/21/92 11:00 a.m.; Trial 8/31/92 1:30 p.m., referring case to Magistrate for settlement (ab) [Entry date 08/17/92]

DATE	NR.	PROCEEDINGS
8/14/92	61	SCHEDULING ORDER by Mag. Judge Phyllis J. Hamilton: stlmnt conf statement due 8/20/92 (cc: all counsel) (ab) [Entry date 08/17/92]
8/17/92	62	MOTION by plaintiff John Papai, plaintiff Joanna Papai for leave to file amended complaint to substitute defendants with Notice set for 8/21/92 at 11:00 am (mcl) [Entry date 08/18/92]
8/17/92	63	MEMORANDUM by plaintiff John Papai, plaintiff Joanna Papai in support of motion for leave to file amended complaint to substitute defendants [62-1] (mcl) [Entry date 08/18/92]
8/17/92	64	DECLARATION by Thomas J. Boyle on behalf of plaintiff John Papai, plaintiff Joanna Papai re motion for leave to file amended complaint to substitute defendants [62-1] (mcl) [Entry date 08/18/92]
8/19/92	65	RESPONSE by defendant to motion for leave to file amended complaint. (pg) [Entry date 08/20/92]
8/19/92	66	DECLARATION by Tana Shipman on behalf of defendant re response [65-1] (pg) [Entry date 08/20/92]
8/19/92	67	DECLARATION by Robert L. Clinton on behalf of defendant re response [65-1] (pg) [Entry date 08/20/92]
8/20/92	68	REPLY MEMORANDUM by plaintiff John Papai, plaintiff Joanna Papai to response to motion for leave to file amended complaint to substitute defendants [62-1] (mcl) [Entry date 08/21/92]

DATE	NR.	PROCEEDINGS
8/21/92	69	MINUTES: (C/R Carl Pline) denying plaintiff's motion for leave to file amended complaint to substitute defendants [62-1] (mcl) [Entry date 08/25/92]
8/25/92	71	MINUTES before Mag. Judge Hamilton 8/24/92: (C/R none); case not settled; Settlement conf (mag) continued to 8/25/92 at 4:00 pm (mcl) [Entry date 09/03/92]
8/25/92	72	MINUTES before Mag. Judge Hamiltion: (C/R none) case not settled (mcl) [Entry date 09/03/92]
8/27/92	70	NOTICE and request for allowance of lien by defendant Harbor Tug & Barge C (mcl) [Entry date 09/02/92]
8/31/92	73	TRIAL briefs submitted by plaintiff John Papai, plaintiff Joanna Papai (mcl) [Entry date 09/03/92]
8/31/92	74	DECLARATION by Thomas J. Boyle on behalf of plaintiff John Papai, plaintiff Joanna Papai in opposition to defendant's calling Don Dawson as a witness at trial (mcl) [Entry date 09/03/92]
8/31/92	75	TRIAL briefs submitted by defendant Harbor Tug & Barge C (mcl) [Entry date 09/03/92]
8/31/92	76	TRIAL MINUTES: (C/B Raymond Linkerman) further trial; witnesses: Albert Milani, John Papai (mcl) [Entry Date 09/09/92]
9/1/92	77	TRIAL MINUTES: (C/R Raymond Linkerman) further trial; witnesses: Mr. Low, John Papai (mcl) [Entry date 09/09/92]
9/2/92	80	TRIAL MINUTES: (C/R Ray Linkerman) Trial continued to 9/3/92 @ 1:30 PM; witnesses Scott Dye; Perin Parastaues (lrc) [Entry date 09/10/92]

DATE	NR.	PROCEEDINGS
9/3/92	79	TRIAL MINUTES: (C/R Ray Linkerman); Trial continued to 9/8/92 @ 1:30 PM; witness Joanna Papai; Ann Wilson; Devin Goslin (lrc) [Entry date 09/10/92]
9/8/92	78	MEMORANDUM by plaintiff re: evidentiary issues (lrc) [Entry date 09/10/92]
9/8/92	81	TRIAL MINUTES: (C/R Ray Linkerman) Trial HELD further trial 9/9/92 (ab) [Entry date 09/15/92]
9/9/92	82	TRIAL MINUTES: (C/R Ray Linkerman) Trial HELD further trial 9/10/92 1:30 p.m. (ab) [Entry date 09/15/92]
9/10/92	83	TRIAL MINUTES: (C/R Ray Linkerman) Trial HELD further trial 9/15/92 1:30 p.m. (ab) [Entry date 09/15/92]
9/16/92	84	TRIAL MINUTES: (C/R Ray Linkerman) Trial HELD 9/16/92 continued 9/17/92 1:30 p.m. (ab) [Entry date 09/25/92]
9/17/92	85	TRIAL MINUTES: (C/R Ray Linkerman) Trial concluded 9/17/92 (ab) [Entry date 09/25/92]
9/18/92	86	EXHIBIT AND DESIGNATION OF WITNESS(ES) (ab) [Entry date 09/25/92]
11/2/92	—	RECEIVED Proposed Order (plaintiffs) permitting filing of briefs in excess of twenty-five pages (tmn) [Entry date 11/04/92]
11/4/92	87	ORDER by Judge Charles A. Legge permitting filing of briefs in excess of twenty-five pages (Date Entered: 11/6/92) (cc: all counsel) (tmn) [Entry date 11/06/92]
11/9/92	88	POST TRIAL BRIEF FILED by plaintiffs (tmn) [Entry date 11/13/92]
11/10/92	89	POST-TRIAL BRIEF FILED by defendant (tmn) [Entry date 11/16/92]

DATE	NR.	PROCEEDINGS
11/12/92	90	CLERK'S NOTICE Final arguments of Trial set for 12/15/92 at 2:30 p.m. (tmn) [Entry date 11/17/92]
11/16/92	91	POST-TRIAL BRIEF FILED by defendant (tmn) [Entry date 11/19/92]
11/16/92	—	RECEIVED Post trial reply brief by plaiffs (tmn) [Entry date 11/19/92]
11/16/92	92	POST TRIAL REPLY BRIEF submitted by plaintiffs (vg) [Entry date 11/20/92]
11/27/92	93	REPORTER'S TRANSCRIPT; Date of proceedings: 8/31/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	94	REPORTER'S TRANSCRIPT; Date of proceedings: 9/1/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	95	REPORTER'S TRANSCRIPT; Date of proceedings: 9/2/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	96	REPORTER'S TRANSCRIPT; Date of proceedings: 9/3/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	97	REPORTER'S TRANSCRIPT; Date of proceedings: 9/8/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	98	REPORTER'S TRANSCRIPT; Date of proceedings: 9/9/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	99	REPORTER'S TRANSCRIPT; Date of proceedings: 9/10/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	100	REPORTER'S TRANSCRIPT; Date of proceedings: 9/16/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]

DATE	NR.	PROCEEDINGS
11/27/92	101	REPORTER'S TRANSCRIPT; Date of proceedings: 9/17/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
12/9/92	102	Amended notice and REQUEST by defendant for allowance of lien (tmn) [Entry date 12/10/92]
12/17/92	103	MINUTES: (C/R Carl Pline) Trial concluded; court finds in favor of defendant (tmn) [Entry date 12/18/92]
12/21/92	—	RECEIVED Judgment submitted by defendant (tmn) [Entry date 12/22/92]
12/28/92	104	JUDGMENT: by Judge Charles A. Legge [20-1] dismissing amended complaint; awarding defendants cost of suit; appeal filing ddl 1/28/93 (Date Entered: 12/29/92) (cc: all counsel) (tmn) [Entry date 12/29/92]
1/5/93	105	BILL OF COSTS in the amount of $3,577.07 submitted by defendant re judgment [104-2] (tmn) [Entry date 01/07/93]
1/20/93	106	NOTICE OF APPEAL by plaintiff from Dist. Court decision judgment of 12/28/92 [104-2] not paid (tmn) [Entry date 01/21/93]
1/21/93	—	Docket fee notification form and case information sheet to USCA [106-1] (tmn)

DATE	NR.	PROCEEDINGS
1990		
1/12/90	1	COMPLAINT: Issued Summons
1/12/90	2	ORDER setting status conference for 4/13/90 at 11 a.m. CAL
1/12/90	3	Plaintiff's Certificate that the damages sought in the complaint exceed $150,000 exclusive of any punitive or exemplary award that might be entered, and of interests and costs.
1/12/90	4	Clerk's notice to counsel re: Matter removed from Mandatory Arbitration under Local Rule 500.
2/2/90	5	Plaintiff's proof of service of Summons and Complaint and supporting documents; Order setting status conference EXECUTED as to Harbor Tug & Barge Co. on 1/23/90 at 11:45 a.m. by personal service.
2/12/90	6	Deft's ANSWER TO COMPLAINT.
3/7/90	7	Notice that status conference reset from 4-13-90 to 5-11-90 11:00am. Clerk
4/12/90	8	Defendant's notice of motion & motion for summary judgment, 5-11-90 @ 9:30am.
4/12/90	9	—Points & authorities in support of #8.
4/12/90	10	—Declaration of Eric Danoff in support of #8.
4/12/90	11	—Statement of undisputed facts.
4/12/90		—RECEIVED: proposed order granting summary judgment.
4/12/90	12	Notice from clerk, defendant's motion for summary judgment has been reset to 5-18-90 @ 9:30am.
5/3/90	13	Plaintiffs' status conference statement, 5-18-90 @ 9:30am.

DATE	No.	PROCEEDINGS
1990		
5/4/90	14	Plaintiffs' memo in opposition to motion for summary judgment, 5-18-90 @ 9:30am.
5/4/90	15	—Declaration of Marina V. Secchitano in opposition to motion for summary judgment.
5/10/90	16	Defendant's status conference statement, 5-18-90 @ 11:00am.
5/11/90	17	Defendant's reply brief in support of motion for summary judgment, 5-18-90 @ 11:00am.
5/18/90	18	MINUTES: (c/r Candace Francis) Defendant's motion for summary judgment—granted. Status conference not held. Case continued to 6-8-90 @ 11:00am. Plaintiffs should file an amended complaint by 5-31-90. CAL
5/22/90	19	Plaintiff's further status conference statement, 6-8-90 @ 9:30am.
5/24/90	20	Plaintiff's FIRST AMENDED COMPPLAINT, Jury trial demanded.
5/29/90	21	ORDER: Plaintiff's causes of action are dismissed with prejudice. Plaintiffs are granted till 5-31-90 to amend their complaint. Status conference set for 6-8-90. CAL
6/8/90	22	MINUTES: (c/r none) Status conference held. Defendant should move to dismiss or file an answer by 6-30-90 & plaintiff should move for reconsideration by 6-30-90. CAL
6/12/90	23	Plaintiff's certificate of service by counsel of first amended complaint.
6/19/90	24	Defendant's ANSWER TO FIRST AMENDED COMPLAINT.
6/26/90	25	Plaintiffs' motion for reconsideration re seaman status, 7-27-90 @ 9:30am.

DATE	No.	PROCEEDINGS
1990		
	26	—Memo in support of #25.
6/27/90	27	Clerk's notice that plaintiff's motion for reconsideration noticed for 7-27-90 is reset to 8-3-90 @ 9:30am.
6/28/90	28	Defendant's notice of deposition of Marina V. Secchitano, 7-9-90 @ 2:00pm.
7/17/90	29	Defendant's brief in response to plaintiff's motion for reconsideration, 8-3-90 @ 9:30 am.
7/27/90	30	Plaintiff's Reply to defendant's brief in opposition, 8-3-90 @ 9:30am.
8/3/90	31	MINUTES: (c/r Judith Dudeck) Plaintiff's motion for reconsideration—denied. Plaintiff & defendant has requested & the court grants & certifies an interlocutory appeal. CAL
8/10/90		RECEIVED: Plaintiffs' order of denial of reconsideration & statement of grounds for immediate appeal.
8/21/90	32	ORDER: The motion for reconsideration is denied & that plaintiffs' causes of action remain dismissed with prejudice. All proceedings herein be stayed for 10 days from the date of entry of this order. CAL
		ENTERED: 8-21-90, copies mailed to parties, clerk.
8/20/90	33	Plaintiffs' proof of service re order of denial of motion for reconsideration.
9/14/90	34	ORDER: Pending the resolution of the interim appeal from the partial summary judgment granted in favor of defendants & against plaintiffs on 8-17-90, all further pro-

DATE	No.	PROCEEDINGS
1990		
		ceedings in this action are stayed & the clerk is directed to remove this case from the activelist. CAL
		ENTERED: 9-19-90, copies mailed to parties, clerk.
1991		
4/18/91	35	Clerk's notice setting status conference for 5/10/91 @ 11:00am.
4/19/91	36	ORDER: This action is to be restored to the active civil list. CAL

[Filed Jan. 12, 1990]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 90 0111 CAL

JOHN PAPAI, JOANNA PAPAI,
Plaintiffs,

v.

HARBOR TUG AND BARGE COMPANY,
Defendants.

COMPLAINT FOR PERSONAL INJURIES AND DAMAGES UNDER THE JONES ACT AND THE GENERAL MARITIME LAW; LOSS OF CONSORTIUM

DEMAND FOR JURY TRIAL
(Local Rule 200-4)

CLAIMS UNDER THE JONES ACT AND THE GENERAL MARITIME LAW

1. *Jurisdiction*: This action arises under the Jones Act, 46 USC §§ 688 *et. seq.*, and the general maritime law, as hereinafter more fully appears.

2. Plaintiff, JOHN PAPAI is a seaman and proceeds without prepaying fees of costs, or furnishing security therefor, under 28 USC § 1619.

3. At all relevant times, defendants, and each of them, owned, managed, operated and controlled the vessel, M/V POINT BARRON, (hereinafter referred to as the vessel) and used the vessel in navigation and commerce in navigation waters.

4. At all relevant times, plaintiff JOHN PAPAI was employed by defendants as a deck hand of the vessel, and was in service of the vessel.

5. On or about March 13, 1989, while acting within the scope of his maritime employment, plaintiff JOHN PAPAI was caused to suffer serious personal injuries as the direct proximate result of the negligence of defendants, defendants' employees, agents and representatives, and the unseaworthiness of the vessel, in that defendants and the vessel:

(a) failed to furnish plaintiff JOHN PAPAI with a reasonably safe place to work;

(b) failed to furnish plaintiff JOHN PAPAI with reasonably safe, suitable and/or proper equipment to perform ordered tasks;

(c) failed to provide plaintiff JOHN PAPAI with efficient able-bodied help so as to safely perform ordered tasks;

(d) placed plaintiff JOHN PAPAI in an unsafe position under the conditions existing at the time and place of the aforementioned injury;

(e) failed to adequately inspect and ensure the proper operation of the vessel's men and machinery so as to obviate the risk of injury to their employees;

(f) failed to properly maintain the vessel's equipment in good working order so as to obviate the risk of injury to their employees;

(g) failed to instruct plaintiff JOHN PAPAI as to the safe and proper manner in which to perform his tasks;

(h) failed to provide timely and adequate medical care, treatment and maintenance and cure;

(i) failed to operate the vessel in a safe manner, which did render the vessel's attendant gear, tackle and appliances unseaworthy;

(j) failed to provide plaintiff JOHN PAPAI with a safe place to work, a safe vessel and competent crew, which did render the vessel's attendant gear, tackle and appliances unseaworthy;

(k) had the knowledge and ability to control and correct said unseaworthy conditions prior to the occurrence of the injury; and

(l) otherwise breached their duties owed to plaintiff JOHN PAPAI under the circumstances.

6. As a direct and proximate result of the foregoing, plaintiff JOHN PAPAI has suffered and will continue to suffer general damages; wage loss; hospital and medical expenses; loss of earning capacity; and inability to lead a normal life.

7. At all relevant times, because of plaintiff JOHN PAPAI's service upon the said vessel, defendants had and continue to have a duty to provide plaintiff with the expenses of his maintenance and cure from the time of his disability to maximum medical care.

8. At all relevant times defendant(s) was/were guilty of malice, fraud and oppression and plaintiff JOHN PAPAI should recover, in addition to actual damages, damages to make an example of and punish defendant(s).

CLAIMS FOR LOSS OF CONSORTIUM

9. Plaintiff JOHN PAPAI hereby refers to and incorporates herein by this reference each and every allegation contained in paragraphs one through eight of this complaint as though fully set forth at length.

10. At all material times herein, and at present, the plaintiffs JOHN PAPAI and JOANNA PAPAI were husband and wife.

11. Under the general maritime law, incident to plaintiff JOHN PAPAI's claims for damages under the Jones Act and the doctrine of unseaworthiness the plaintiff JOANNA PAPAI is likewise entitled and empowered to recover loss of cure, discomfort and society, support and enjoyment of her husband, proximately caused by defendants' negligence and the unseaworthiness of their vessel.

12. In her own right, plaintiff JOANNA PAPAI, seeks damages against defendants, and each of them, incident to recovery by plaintiff of a sum in excess of $500,000.00 which sum represents a fair and reasonable estimate of the monetary value of the loss of care, comfort, society and support and enjoyment which JOANNA PAPAI has endured as a result of the injury to her husband JOHN PAPAI.

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For general damages in a sum according to proof and in excess of $1,000,000.00;

2. For medical expenses, past and future, according to proof;

3. For loss of earnings, past and future, according to proof;

4. For maintenance and cure benefits according to proof;

5. For interest at the rate prescribed by law upon all sums owing as maintenance and cure and for reasonable attorney's fees on said amounts;

6. For damages for loss of consortium on behalf of plaintiff, JOANNA PAPAI, in a sum in excess of $500,000.00;

7. For costs of suit; and,

8. For such other and further relief as the court may deem just and proper.

DATED:

SULLIVAN, JOHNSON, BOYLE & NURIK

/s/ Thomas J. Boyle
THOMAS J. BOYLE
Attorneys for Plaintiff
JOHN PAPAI
JOANNA PAPAI

JURY TRIAL DEMANDED

Plaintiffs hereby demand trial by jury.

SULLIVAN, JOHNSON, BOYLE & NURIK

/s/ Thomas J. Boyle
THOMAS J. BOYLE
Attorneys for Plaintiff
JOHN PAPAI
JOANNA PAPAI

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

Date: May 11, 1990
Time: 9:30 a.m.
Courtroom: Judge Legge

DECLARATION OF ERIC DANOFF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Eric Danoff, am an attorney with Graham & James, counsel for defendant HARBOR TUG AND BARGE COMPANY. My business address is One Maritime Plaza, Suite 300, San Francisco, California. On March 7, 1990, I took the deposition of plaintiff JOHN PAPAI. Attached hereto are copies of pages from the transcript of that deposition.

Executed at San Francisco, California, on April 12, 1990.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 12, 1990.

GRAHAM & JAMES

By: /s/ Eric Danoff
ERIC DANOFF
Attorney for Defendant
Harbor Tug and Barge Company

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

DEPOSITION OF JOHN D. PAPAI

* * * *

March 7, 1990

* * * *

[10] Q. After 1968 when you finished with San Francisco State, did you then begin working?
A. Yes.
Q. What was your first job?
A. I believe it was the post office.
Q. Was this in 1968?
A. I don't really remember.
Q. Would it have been '68 or '69?
A. Either one or the other.
Q. What—how—strike that. How long did you work for the post office?
A. A year.
Q. What was your job there?
A. Mail clerk.
Q. Was that here in San Francisco?
A. Yes.
Q. What was your next job?
A. Hum. I believe it was Health, Education and Welfare.
Q. Is that the Department of Health, Education and Welfare?
A. Yes.
Q. So you worked for the Federal Government?
A. Yes.
Q. What year did you begin that work?
A. I believe—let me see. I believe it was [11] '69.

Q. How long did you work for DHEW?
A. Three years.
Q. Until about 1972?
A. Yes.
Q. What was your job during those three years?
A. Mail clerk.
Q. Was that here in San Francisco?
A. Yes.
Q. What did you do as a mail clerk?
A. Just sorted mail, wrap packages and distribute mail.
Q. After working for the Department of Health, Education and Welfare, what was your next job?
A. Part owner of a bar.
Q. Did that begin in 1972?
A. Yes.
Q. What bar was that?
A. Called Paradise Cafe.
Q. In what city?
A. San Francisco.
Q. How long—strike that.
A. In addition to being an owner, did you work in the bar?
A. Yes.
Q. Was that your full-time job, working in the [12] bar?
A. Yes.
Q. You had no other outside employment.
A. No.
Q. How long did you work in the bar?
A. That particular bar, five years.
Q. So that would be until about 1977?
A. That's correct.
Q. What work did you do in the bar?
A. Managing, bartending.
Q. You did both?
A. Uh-huh.

Q. Is your answer yes?
A. Yes.
Q. Off the record.

(Discussion off the record.)

MR. DANOFF: Back on the record.

Q. I understand what a bartender does, but what did the manager do; did that mean keeping books and hiring people or what?

A. Hiring people, firing people, inventory, daily banks.
Q. I'm sorry.
A. Daily bank is, we have to have cash for the bank.

* * * *

[15] Q. Was there a formal bankruptcy proceeding of any sort?

A. No. The Federal Government got us for back taxes.

Q. So you just gave them the bar and that was that?
A. Yes.
Q. What was your next job then after that?
A. Bartender again.
Q. Beginning in 1977?
A. No. It was more like '79 or '78.

Q. Did you take some significant time off between the time the Paradise Cafe closed down—

A. About—
Q. —and the time you went back to work?
A. About a year.
Q. And what did you do generally during that year?
A. Just odd jobs.
Q. In the San Francisco area?
A. Yes.
Q. So you had no full-time employment?
A. No.

Q. Then you became a bartender, I believe you said, in 1978 or '79?

A. I believe '79.

]16] Q. And where did you begin working as a bartender?

A. Coffee Gallery.
Q. Was that Coffee Gallery or Galleria?
A. Gallery.
Q. G-a-l-l-e-r-y?
A. Correct.
Q. Where is that; San Francisco?
A. Yes.
Q. How long did you work at the Coffee Gallery?
A. About a year.
Q. Were you strictly a bartender there?
A. Yes.
Q. Did you do any management of any sort?
A. I did inventory.
Q. Did you do any other management function there?
A. No.
Q. Were you an owner of that?
A. No.
Q. Were you a member of a bartenders' union?
A. No.
Q. Then what was your next job?
A. Bartender again at the Fresno Hotel Saloon.
Q. This is beginning in about 1980 then?
A. Yes.
[17] Q. Until when?
A. Oh, boy. About either '83 or '84.
Q. Would you repeat the name of the bar?
A. Fresno Hotel Saloon.
Q. Was that in San Francisco?
A. Yes.
Q. What was your job there?
A. Bartender.
Q. Were you an owner at all?
A. No.
Q. Did you have any management function at all?
A. No.

Q. Not even inventory?
A. No.
Q. Strictly bartender?
A. Yes.
Q. Were you a member of a union?
A. No.
Q. Have you been a member of a bartenders' union?
A. Yes.
Q. Which union was that?
A. Hotel Employees—Hotel and Restaurant Employees, Local 2, the one here in the city.
Q. When did you join that?
A. It was—I believe that was 1986.
Q. Okay. So we haven't got there yet in [18] sequence.
A. No. Correct.
Q. Okay. After you left the Fresno Hotel Saloon, what was your next job?
A. Red and White Catering.
Q. What year did you begin working for Red and White Catering?
A. I believe it was 1983?
Q. You said earlier you left the Fresno Hotel Saloon in 1983 or 1984. Does that help you remember when you joined Red and White Catering?
A. Must have been '83 then.
Q. How long did you work for Red and White Catering?
A. I believe it was two years.
Q. Until 1985.
A. Yes. Oh, wait a minute. They went out of business in—was it '84? Must have been '85; I'm not sure.
Q. By the way, do you have any records of your employment history so we could get these dates more precisely?
A. Not with me, no.
Q. Do you have some at home?
A. Yes.

Q. What did you do for Red and White Catering?
[19] A. Catering and bartending.
Q. Was Red and White—who owned or operated Red and White Catering?
A. Mario Garcia.
Q. Were you an owner at all of Red and White Catering?
A. No.
Q. You said you did bartending and catering—
A. Correct.
Q. —work.
What kind of bartending did you do? Was this—I don't know what this company does.
A. Sometimes private parties and sometimes just regular bay runs.
Q. So this is on board ship?
A. Yes.
Q. Were—was all of your work for Red and White Catering aboard ship—
A. Yes.
Q —rather than on the shore?
A. Correct.
Q. Was this catering on the Red and White fleet?
A. Yes.
Q. And was all your work on the San Francisco Bay?
A. Sometimes up in the delta.
[20] Q. Okay. But not outside the Golden Gate?
A. No.
Q. What kind of boats did you work on—first of all, did you work on one boat or more than one?
A. All the boats.
Q. How many were there?
A. I believe they have eight.
Q. Had then or have now? What I'm asking is what they had then. Let's go off the record.

(Discussion off the record.)

(Record read back by the reporter.)

THE WITNESS: Eight, I believe.

MR. DANOFF: Q. What kind of boats were these?

A. Ferry boats.

Q. What ports did the ferry boats go at while you worked aboard.

A. You mean—

Q. They called it San Francisco or where else?

A. San Francisco for me.

Q. Were they all party boats, or were they actually real ferry—

A. They did both.

Q. And you worked on them in both runs—

A. And parties.

Q. You mentioned that Mario Garcia, I thought you [21] said, owned Red and White Catering. Did I understand you correctly?

A. Yes.

Q. Was Red and White Catering in your understanding a separate company from the company that owned the boats?

A. Yes.

Q. So your employer was the company Red and White Catering, not the boat owner, as far as you understood.

A. That's correct.

Q. Were you a member of a union during that period?

A. Yes.

Q. Which union?

A. Inland Boatman's Union.

Q. I call that the I.B.U.; do you understand that to be the Inland Boatman's Union?

A. Yes.

Q. Have you been a member of the Inland Boatman's Union since?

A. I still am.

Q. Have you always been a member since the first time you joined?

A. Yes.

Q. There was no laps of membership?

A. I don't understand.

* * * *

[24] A. Only Red and White Catering.

Q. What did you do for Red and White Catering exactly?

A. Bartending and catering.

Q. What does catering mean; what did you do as a caterer?

A. Stocked the boat with food and tables, set it up, present the food, serve the food, then break it down and take it off the boat.

Q. So part of the job was set up—

A. Yes.

Q. —of the tables and the food?

A. Yes.

Q. Part of it was serving the food?

A. Yes.

Q. Part of it was cleanup afterward?

A. Yes.

Q. Did you cook during this period?

A. Yes.

Q. Did you also do other kinds of food preparation, slicing, dicing—

A. Yes.

Q. —and all that?

A. Yes.

Q. Did you cook hot meals?

A. Not cook, just warmed it up.

[25] Q. Did you ever join a union for cooks?

A. No.

Q. At any time?

A. No.

Q. Have you ever been a member of any union other than the I.B.E.—or the I.B.U. and the—I forget the name of the other bartenders' union; I'm not sure. What was the name of that other union?

A. Hotel—what was it? Hotel and Restaurant.

Q. And you said you joined Local 2?
A. That's Local 2, yeah.
Q. By the way, is there a local for the I.B.U.?
A. No.
Q. Did you join the Hotel and Restaurant Workers' Union while you were working for Red and White Catering?
A. No.
Q. After you left Red and White Catering?
A. That's right.
Q. Have you been a member of any other union other than those two?
A. No.
Q. Who was your immediate superior at Red and White Catering; who gave you your instructions, and to whom did you report about your work?
A. Elizabeth.
Q. Do you remember her last name?
[26] A. No.
Q. What was her title?
A. Supervisor.
Q. And she also was an employee of—as far as you understood it—Red and White Catering?
A. That's right.
Q. So Mr. Garcia was not your immediate supervisor?
A. No.
Q. Did you take any instructions from the ship's captain or the boat's captain or crew while you were catering?
A. Not normally, no.
Q. So if they had a problem, they would talk to Elizabeth or somebody else above Elizabeth in the heirarchy?
A. Oh, sure.
Q. Have you explained then everything you've done for Red and White Catering as far as kinds of work?
A. That and bartending.

Q. Was there any management function as far as you understood it to your job at Red and White Catering?
A. No.
Q. What was your job after leaving Red and White Catering?
A. Went down to the union hall.
Q. This is—
[27] A. I.B.U.
Q. Was this beginning in 1987?
A. Yes.
Q. Have you had any full-time employment since leaving Red and White Catering?
A. Just out of the hall, out of I.B.U. hall.
Q. When you—strike that
Where is the I.B.U. hall?
A. 501 Army Street.
Q. San Francisco?
A. Yes.
Q. You say you have no permanent employment other than out of the hall. My question is, have you worked for any one company, whether you got the job through the hall or not, for, say, two months or more since 1987. Beginning of '87?
A. I had 40 days of Golden Gate.

(Discussion off the record.)

MR. BOYLE: That's all. She just wanted you to repeat the words you said, not an explanation.
MR. DANOFF: Q. Golden Gate is the Golden Gate Transit District?
A. That's correct.
Q. What did you do for the Golden Gate Bridge or Transit District?
A. During the 40 days?
[28] Q. Yes.
A. Maintenance on the docking area at the San Francisco ferry terminal.

Q. Was this in 1988?
A. Yes.
Q. What do you mean by maintenance; is that painting or cleanup or what?
A. Chipping. Chipping and painting.
Q. Was this job on the dock itself rather than on boats?
A. Yes.
Q. So you did not work for the Golden Gate Bridge District on boats, correct?
A. During that Friday period, that's correct.
Q. Since, say, January 1st, 1987, and other than the Golden Gate Bride District work, have you worked for any other employer for more than a month?
A. No.
Q. So your jobs have been all shorter than one month other than one job?
A. That's correct.
Q. What kinds of jobs have you had out of the I.B.U. hall?
A. Deck hand and maintenance.
Q. When you use the term "deck hand," what do you mean by that?
[29] A. Docking boats, throwing lines.
Q. You mean you stand on the dock and throw the lines to the boat, or you stand on the boat and throw the lines to the dock?
A. Stand on the boat and jump off the boat and put the line on the dock.
Q. And by maintenance, what do you mean?
A. More or less chipping rust and painting.
Q. Now to get a job out of the I.B.U. hall, do you have to appear there in person?
A. Yes.
Q. Why don't you explain to me the sequence of how you get a job out of the I.B.U. hall.
A. Okay. Well, every three months—I have a "C" card, okay? Every three months, everybody goes and

there's a whole block of "C" cards. And every three months, you have to re-throw your card in, and you go to the bottom of the list. So towards the bottom of the three-month period, you're pretty high on the list of "C" cards. And when they have a job on the board, you throw your card in, and if your number is highest, you get that job
Q. Now if I understand you correctly, if someone with an "A" card or "B" card wanted the job, they would get it?
A. That's correct.

* * * *

[32] Q. And they use the I.B.U.?
A. Yes.
Q. And you had some of those jobs?
A. Uh-huh.
Q. And your answer is yes?
A. Yes.
Q. And those are longshore jobs?
A. Yes.
Q. What kind of work did you do as a longshoreman?
A. What they call lashing, sometimes fish meal.
Q. What does fish meal involve?
A. Shoveling fish meal, dried fish.
Q. Okay. Anything else?
A. Steel working.
Q. Discharging or loading steel?
A. Discharging.
Q. Were you working on the ships, or were you working on the shore?
A. Mostly on the ships; sometimes on the shore.
Q. Did you work for any particular stevedore company?
A. Not that I know of—I don't know the name, because all the checks came from the same company.

Q. Did the checks come from the Pacific Maritime Association?

[33] A. That's it.

Q. Okay. But was there a particular stevedore company who was involved in the work you were doing as a longshoreman?

A. Yeah, there were different companies, yes, but they all seemed to be under Pacific Maritime.

Q. But you didn't work for one particular stevedore company?

A. No, I don't think so. No.

Q. Okay. So if I understood you correctly, you did deckhand and maintenance work on boats?

A. Uh-huh.

Q. This is from January 1987 until now.

A. Correct.

Q. You did maintenance work on shore for the Golden Gate Bridge District?

A. Yes.

Q. You did longshoring, some on shore and some on ships, for companies affiliated with the Pacific Maritime Association, right?

A. That's correct.

Q. Did you do any other kind of employment beginning January 1987 until now?

A. Yes. I was with that Local 2 for three or four months.

Q. Local 2 is the Hotel and Restaurant Workers' [34] Union?

A. Yes.

Q. What work did you do through Local 2?

A. Bartending.

Q. On shore side?

A. Yes.

Q. For what entity?

A. Through the union.

Q. Does that mean you worked for various—

A. Yes.

Q. —different places?

A. Yes.

Q. How long did you do that?

A. About three months.

Q. What year was that?

A. I believe it was '87.

Q. But you worked strictly as a bartender?

A. Yes.

Q. If—strike that.

Do you have any records anywhere that would allow you to list for us the jobs you had through the I.B.U. from January 1987 on?

A. Payroll stubs.

Q. You do have those payroll stubs at home?

A. I believe so, yeah.

* * * *

[37] A. Are you talking about being a deckhand or a bartender?

Q. A bartender.

MR. BOYLE: You were asking from January 1, '87 on.

MR. DANOFF: Strike that. I stand corrected.

Q. From the period January 1987 on, did you ever work as a bartender aboard a boat?

A. No.

Q. So you were strictly a deckhand and a maintenance worker?

A. That's correct.

Q. Was any of that work at night?

A. Yes.

Q. You used the word relief a couple of times; would you explain what a relief job is?

A. It's somebody who has a regular job; they have to take a day off, I expect, or is sick; you're the one that fills in for them.

Q. So you would relieve permanent deckhands or permanent maintenance hands on the boat for—

A. On some occasions.

Q. Were most of your jobs out of the I.B.U. hall for one day?

A. Sometimes they were a couple days; sometimes [38] three days, mostly one day.

Q. On those jobs that were more than one day, was it just by chance that you went back the second day and got the same boat, or were you actually given a two- or three-day job?

A. Sometimes a two- or three-day job.

Q. But normally speaking, it was a one-day job?

A. Yes.

Q. The work you did as a deckhand and maintenance man, was some of that work done while the boats were moving on the water and some done while it was tied to the dock?

A. The maintenance was while it was tied to the dock, and deckhand was when it was moving.

Q. I couldn't tell from the payroll stubs; I don't think they say; can you tell me generally speaking what percentage of your work since January '87 has been deckhand work and what percentage of your work out of the I.B.U. hall has been maintenance work?

A. I'd say 70 percent deckhand.

Q. Seven zero?

A. 70 percent deckhand.

Q. And was most of that work done while the boats were moving on the water?

A. Yes.

* * * *

[41] Q. —the three days immediately preceding the accident?

A. That's correct.

Q. Was your work on the Point Barrow before the accident date maintenance work—

A. Yes.

Q. —rather than deckhand work?

A. That's true.

Q. Did you say that you worked on that boat three or four times you think?

A. Yes.

Q. And it was all maintenance work?

A. That's right.

Q. In other words, the boat was always tied to the dock—

A. Yes.

Q. —when you worked on it?

A. Yes.

Q. Have you been aboard the Point Barrow other than to do that maintenance work?

A. No.

Q. When you worked on the Point Barrow, on all the occasions you worked on it, did you always sleep ashore?

A. Yes.

Q. And you got all those jobs out of the union [42] hall.

A. Yes.

Q. The job that you got for the March 13, 1989 work, was that a single-day job, or was that going to be more than one day?

A. I believe it was one day.

Q. And then so you were planning to go back to the union hall the next day to see what else was available?

A. Yes.

Q. Did you work at all on March 12, 1989, the day before the accident?

A. No.

Q. Did you work on March 11th?

A. No.

Q. How would you decide what days you were going to go into the union hall to get a job?

A. I went everyday.

Q. So on the two days before March 13, you went in, but you were not high enough on the list?

A. Well, the 12th was Sunday, and the 11th was Saturday, so the hall is closed.

Q. Okay. Let's go back to the Friday. Did you work on the Friday?

A. No.

* * * *

[50] Q. Is it your understanding that the employer, prospecive employer, call the union hall, says, I need three men to do maintenance work, and then the union gets three men and sends them out?

A. Yes.

Q. And to show that you're one of the three men the union has sent out, you give the employer a dispatch slip?

A. Not really.

Q. Well, what paper do you present so that they know you're legitimately sent out by the union?

A. Usually they have your name already, so—

Q. Do you keep the dispatch slip then?

A. (Witness shakes head negatively.)

Q. But you're given it by the union to show that you're one of the three men selected?

A. Yes.

Q. Now at the end of the day, what piece of paper is generated to show that you worked for that day?

A. Usually logged on the captain's report.

Q. And then does he give you something?

A. No.

Q. How do you get paid normally?

A. You be sure your name is on the log and the hours are correct. At the end of the week, or whatever the time period is, they issue you the checks.

[51] Q. They send it to you in the mail?

A. No, usually you go down to get it.

Q. At the company or the union hall?

A. The company.

Q. Now in the case of the Point Barrow, when you worked on it as a maintenance worker, was there a captain aboard the ship?

A. That day you mean?

Q. Yes.

A. No.

Q. So in that case, there's no log, right?

A. True.

Q. So how do you, in that case, in the case of the Point Barrow in the days before your accident when you worked on that tug, how did you verify you worked and got paid?

A. I reported to Don Dawson.

Q. Don Dawson in your understanding was who?

A. Port captain.

Q. He was a shoreside guy?

A. Yes. I believe so.

Q. Where was his office?

A. On the premises.

Q. The premises are what, by the way?

A. The home dock in Alameda.

Q. And that's—was that where the Point Barrow [52] was tied up every time you worked on it as a maintenance worker?

A. Yes.

Q. And there was an office shoreside there on the dock?

A. Yes.

Q. And Mr. Dawson was there in each case?

A. Yes.

Q. So at the end of the day, except on the day when you were injured, what would you do to verify to Mr. Dawson that, yes, you'd worked that day?

A. He knew we were there. And at the end of the day, we reported to him saying we were done.

Q. Did you get some sort of receipt or time sheet?

A. Yes.

Q. Did you keep those?

A. I believe so.

Q. So you think you have those at home?

A. Yes.

Q. What is the piece of paper called?
A. I don't know.
Q. What generally did it have on it?
A. The time, the boat you worked on and a signature.

* * * *

[57] Q. By that I'll include not a formal interview. But somebody asking you what happened, and what time was it, and where were you, what were you doing, those kinds of questions; have you ever answered those kind of questions about this accident?

A. Other than Mr. Boyle, No.

Q. Approximately how many companies have you worked for sailing out of—or strike that—getting jobs out of the I.B.U. hall since January '87?

A. Red and White, Golden Gate, Harbor Tug, and the longshore.

Q. But the longshore jobs, putting those aside, and putting Golden Gate Bridge District job aside, because I though you said you were shoreside during that job.

A. Just for that one particular job.
Q. You've also worked on their farries?
A. At the decking, yes.

Q. So the companies you worked for basically were Red and White, Harbor Tug and Barge and the Golden Gate Bridge District.

A. That's correct.

Q. When you worked on the Point Barrow on occasions other than the day you had your accident, you said you were doing maintenance work, but what kind of maintenance work was it?

[58] A. Chipping rust and painting.

Q. So that's all the work you've done on the Point Barrow basically is chipping rust and painting.

A. That's correct.
Q. Have you ever filed a lawsuit before?
A. No.

Q. Have you ever been sued in a lawsuit?
A. No.
Q. Have you ever filed a claim for a personal injury before?
A. No.
Q. Okay. Let's go off the record.)

(Discussion off the record.)

MR. DANOFF: Q. After the injury that you had on the Point Barrow in March 1989, you went to the Merritt-Peralta Hospital. And do you remember the name of the doctor you saw?

A. No, I don't.

Q. Did you only see that doctor that one time, or have you gone back to that doctor?

A. Just that one time.
Q. What did that doctor say to you about your injury?

A. She really didn't have a diagnosis that I remember. But she wanted me to come back, I think, in a couple, three days.

* * * *

[82] Q. After your operation, at what point did your knee stop hurting when you were just sitting or not active; was it a week later, a month later, or what?

A. A couple months, I guess.
Q. After the—strike that.

At the time of the accident was there anybody else on the boat.

A. On the boat, no.
Q. Was there anybody shoreside near the boat?
A. Not that I saw.
Q. Where was Mr. Lowe, if you know?
A. He was on the other side of the dock.
Q. On a different boat?
A. Yes.

Q. So you were by yourself on the boat at the time of the accident?

A. Yes.

Q. By yourself on the Point Barrow?
A. Yes.
Q. Do you know or have any reason to believe that anyone saw you fall?
A. I don't know.
Q. Did Mr. Lowe say he saw you fall?
A. No.

* * * *

[84] Q. Was there anyone else working on that other boat?
A. With Mr. Lowe?
Q. Yes.
A. Yes.
Q. What was the name of the other boat?
A. Sea King.
Q. Did you talk to any of those other people besides Mr. Lowe who were on the Sea King?
A. No.
Q. So you don't know whether they saw your accident or not.
A. That's correct.
Q. How was the Point Barrow docked at the titme of your accident?
A. Portside to the dock.
Q. And you were working at the front of the house, correct?
A. Yes.
Q. How was the Sea King docked?
A. I believe portside to the dock on the other side.

* * * *

[90] Q. How old is your wife?
A. 45.
Q. Had she ever worked for a living?
A. Yes.
Q. And what was her occupation?
A. The most recent?

Q. Yes.
A. Waitress.
Q. When was the last time she worked as a waitress?
A. Before the baby was born, so I suspect it was '86.
Q. Had she worked in any other occupations other than being a waitress?
A. Post office, nailing redwood planter boxes, selling crystal. That's all I can really remember.
Q. Okay. Now let's go ahead and take our break.

(Brief recess taken.)

MR. DANOFF: Q. I believe you testified that the day of the accident, March 13, 1989, that morning you got the job out of the union hall, right?
A. I believe it was off standby.
Q. What is standby?
A. Well, if there's nothing at the hall for that [91] particular time, you get on the standby list, which means if a company needs you, either Golden Gate or Red and White or Harbor Tug needs you, say, for a morning shift or a later shift that day, they can give you a call.
Q. Is it your recollection that the accident was on a Monday?
A. It was on a Monday.
Q. Then did you go down to the union hall that morning?
A. No.
Q. Did you call down to the union hall?
A. No.
Q. How did you know there were no jobs available directly out of the hall?
A. I didn't because I was on the job.
Q. Did you get the job for the Point Barrow on the preceding Friday?
A. No, it was—somebody from Harbor Tug and Barge called. I suspect it was Sunday night.

Q. That's not—I confess to being confused here.
A. Okay.
Q. You say there's a standby list.
A. Yes.
Q. And is that a list of people who are I.B.U. members?
[92] A. That's correct.
Q. And what is your understanding about how someone like Harbor Tug and Barge gets a worker off the standby list?
A. They call them up on the telephone.
Q. How many people are on the standby list; is the whole union on the standby list?
A. No. Some of the members go out on jobs, and then the other ones, you get on the standby list.
Q. Okay. So that those people who got a job on Friday were not on the standby list?
A. Yes, they're eligible as well.
Q. Is the hall closed on Saturday and Sunday?
A. That's correct.
Q. I thought you said that the only people on the standby list are the people who have not gotten jobs from the hall.
A. I was mistaken then.
MR. BOYLE: No. You asked if the entire I.B.U. was on the standby list. And he said there are people that have jobs that aren't on the standby list. Not the entire I.B.U. are; they are people who have steady jobs, all kinds of variation.
MR. DANOFF: Q. Let's talk about people who don't have steady jobs.
I take it there are people who have steady [93] jobs and they go there everyday.
A. Yes.
Q. The other people are called what?
MR. BOYLE: Casuals.
MR. DANOFF: Q. You were a casual?
A. That's correct.

Q. Now let's limit our questions to the casuals. Are all the casuals on the standby list?
A. Well, there's a standby list for each company, so some choose to go to one company over another.
Q. What standby list were you on?
A. I was on Harbor Tug, I believe.
Q. Were you also on the Golden Gate Bridge standby list?
A. No.
Q. Were you on any other standby list?
A. I may have been on Red and White; they could have called me as well.
Q. When somebody calls from the standby list, the company just calls directly?
A. To the house.
Q. Do you recollect for sure that's how you were hired on March 13th?
A. Yes.
Q. Do you know who called you?
A. No.
[94] Q. Do you remember what they said when they called you?
A. We have a job for you.
Q. Anything else?
A. Just information where to go and what time.
Q. And what time did you go to the job on Monday?
A. I believe it was 8:00 o'clock.
Q. 8:00 a.m.?
A. A.m., yes.
Q. And where did you go?
A. Home Dock, Alameda.
Q. That's the same place you worked before, I take it, when working on the Point Barrow?
A. Yes.
Q. Had you worked at all that Friday, Saturday or Sunday preceding?
A. No.

Q. When was the next previous job that you had?
A. I believe the 4th of March, I believe.
Q. Approximately nine days before the accident?
A. I believe so. I'm not absolutely certain.
Q. Do you remember what that job was on the 4th?
A. It was a maintenance job. I don't remember exactly what boat it was on.
Q. You don't remember which boat or which company?
[95] A. Actually, you can look it up yourself.
MR. BOYLE: We can look it up on here.
THE WITNESS: It will give you all the particulars, because they list by boat.
MR. DANOFF: Q. Okay.
A. It would be the last page, I believe.
Q. Did you know that your job would be a maintenance job on the 13th when you went there?
A. Yes.
Q. Rather than a deckhand job.
A. Yes.
Q. You knew the boat would be tied up.
A. Yeah, I guess.
Q. And you understood you were going to do chipping and painting?
A. I believe it was—yes.
Q. Now when you arrived at the home dock, did you meet with anyone, or did anyone give you instructions about what do do?
A. Don Dawson.
Q. Had you known Don Dawson before?
A. Just working with him in maintenance at home dock?
Q. Did you know him outside of a work context at all?
A. No.
[96] Q. Did you know Mr. Lowe outside of a work context at all?
A. No.

Q. You mentioned you said he was your friend; did you socialize with him at all?
A. No.
MR. BOYLE: It says Sea Fox on here for the 3rd of March.
THE WITNESS: That should be correct.
MR. DANOFF: Q. Does that—
A. Make sense?
Q. —conform to your recollection?
A. Yes.
Q. All right. When you got to the home docks and talked to Mr. Dawson, what did he say?
A. We were going to paint. We were going to be painting.
Q. You used the term "we," was there anyone else?
A. I was with Edwin Lowe.
Q. So the two of you started together out on the same boat?
A. That's correct.
Q. Did Mr. Lowe start work at the same time you did, about 8:00 o'clock?
A. Yes.
Q. When—did Mr. Dawson say anything else?
[97] A. Just to start painting.
Q. Did he tell you where to paint?
A. Yes, we had to paint the red lead primer paint. We had to paint over that with white paint.
Q. Was there any particular part of the ship?
A. Pretty much all over.
Q. Did you and Mr. Lowe then begin painting?
A. Yes.
Q. And approximately what time did you actually begin painting?
A. Well, we had to get the paint, I suppose. I really can't remember. I wouldn't think it was more than 20 minutes.
Q. So now we're at 8:20 in the morning?
A. I believe so.

Q. How long did you and Mr. Lowe paint in the morning?

A. We—I suspect about 11:30 or noon.

Q. Did you then take a lunch break?

A. I did. Mr. Lowe had been called to work on the Sea King.

Q. When was he called to work on the Sea King?

A. Before noon.

Q. Was there some period before noon where you were painting by yourself on the Point Barrow?

A. I believe I painted a little bit more and then [98] decided to take lunch.

Q. So the sequence was, you and Mr. Lowe began painting together on the Point Barrow, then the late morning he went off to the Sea King, and you painted alone for a short period and then took a lunch break.

A. To the best of my recollection.

Q. How long was your lunch break?

A. Half an hour.

Q. So did you then go back and start painting again in the afternoon?

A. Yes.

Q. This time you were by yourself?

A. Yes.

Q. And you continued to paint by yourself until the time of the accident?

A. That's correct.

Q. When would the workday have ended had you not had an accident?

A. I believe 4:30.

Q. Was anybody—did you—strike that.

Did you speak with Mr. Dawson at any time after the original discussion with him at about 8:00 in the morning?

A. I believe he came by around 10:00 to see how we were doing. And he came back later. That's when he asked Edwin if he wanted to go on the Sea King.

[99] Q. So Mr. Dawson came by at about 10:00?

A. I don't really remember, actually. I think I remember him coming just to see the progress of the work.

Q. Don't guess. If you remember, say so; if you don't remember—

A. I don't remember.

Q. You do remember him coming, though, to get Mr. Lowe or ask Mr. Lowe if he wanted to move over to the Sea King?

A. That's correct.

Q. And was there any other discussion with Mr. Dawson at that time?

Well, yes. I asked him, "Am I going to be working alone?" and he said "Yes." And I said, "Should I continue working on the ladder?" He said, "Finish it."

Q. What were you actually finishing? What were you painting in the morning?

A. Painting all the red lead paint; the primer, we were painting white over that.

Q. Was it on the house that you were painting, or were you painting the deck, or what were you painting?

A. Mostly the house.

Q. Now you've referred to the ladder; was it the same ladder that you were using when you fell later in the day?

A. Yes.

* * * *

[105] Q. So as far as you know, you were the only one aboard that tug after the lunch break at all.

A. That's correct.

Q. So was it your decision then in what order to paint?

A. I thought I'd finish up the housing.

Q. But in terms of exactly where to paint at any given hour, was that left up to you?

A. Yes.

Q. Was it your job to paint until the day was over, or was it your job to finish the house, however, long that took?

A. Just finish the painting.

Q. Well, were you going to stay later than 4:00 if the house was not finished or later than 4:30?

A. That would have depended on Dawson.

Q. Do you know when the tug boat was scheduled to leave?

A. No.

Q. Do you know if the tug boat was scheduled to leave?

A. Yes—do I know what? I'm sorry.

Q. Did you know when it was scheduled to leave?

A. I didn't know.

Q. Once the day was over, had you not been injured, then is it your understanding you would have [106] gone home; you might have received a call; you might not from the standby list, and if not, you'd go back to the union hall the next day?

A. That's correct.

Q. So there was no commitment you'd be back at the Point Barrow the following day?

A. Oh, no, no.

Q. Is my statement correct?

A. That's correct.

Q. Were you on a straight time or an overtime rate?

A. Straight time.

Q. The vessel's engines were idle—

A. That's correct.

Q. —during that entire day?

A. Yes.

Q. There were no ships—permanent ship's officers or a crew aboard?

A. No.

Q. Were you keeping any sort of record of your time; were you just going at the end of the day, say, I worked—

in other words, were you keeping any sort of a log yourself?

A. No.

Q. No?

A. For that day?

* * * *

[109] Q. Were there ladders available on the Sea King?

A. I don't know.

Q. Now I want you to—strike that.

If I understood your earlier testimony correctly, you were coming down the ladder—

A. Yes.

Q. —when you fell?

A. Yes.

Q. And you believe you were two or three rungs from the deck, from the bottom of the ladder.

A. Yes.

Q. And in detail now, exactly how did you fall; where; what happened?

A. The ladder is a little bit towards the starboard side; I was working around the housing.

Q. Let's place the ladder more specifically. Where in relation to the house was the ladder?

A. Off center to the starboard side.

Q. Toward the forward starboard side?

A. No. Forward portside, I'm sorry. Forward portside.

Q. So it's on the forward port—

A. Yes.

Q. —side of the house?

A. (Witness nods head affirmatively.)

* * * *

[112] Q. To another spot to paint a different area?

A. That's correct.

Q. As you were coming down, did you notice the boat rock or whip or roll?

A. No.

Q. Did the ladder move, or did your foot slip?
A. I believe the ladder moved.
Q. So you believe?
A. Well, I don't really remember.
Q. Did it happen so fast that you're really not sure what happened?
A. That's correct.
MR. BOYLE: Wait a minute. You said you believed the ladder moved. Don't talk yourself out of whatever it is you believe.
MR. DANOFF: Well, believing and remembering are somewhat different.
THE WITNESS: Yeah. Well, I do remember it moving on the top part where the wood hit the metal.
MR. DANOFF: Q. Where the wood of the ladder hit the metal of the house?
A. That's right.
Q. Which direction did it move?
A. I believe it was moving towards portside.

* * * *

[118] Q. Okay.
A. And it was sawed off at the point where it was split, I believe.
Q. Okay. So there was no split rung at the time of your accident?
A. Rung?
Q. Rung.
A. Yeah. No, the rung seemed okay.
Q. Was your pay by the hour—
A. Yes.
Q. —on this job.
A. Yes.
Q. I take it when the vessel was going to sail to wherever it was going to sail, you were not going to go on it, correct?
A. I don't believe so.

Q. I asked that question poorly.
Were you going to sail away on the vessel when it left after it was finished?
A. No.
Q. You were planning to go back and continue working on a periodic basis through the union?
A. That's correct.

* * * *

[Proof of Service Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

Date: May 11, 1990
Time: 9:30 a.m.
Courtroom: Judge Legge

DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

Defendant HARBOR TUG AND BARGE COMPANY (HTB), pursuant to Local Rule 220-7, submits the following statement of material facts not in dispute. This is submitted in connection with HTB's Motion for Summary Judgment scheduled for May 11, 1990. References to "Papai" are to the deposition of plaintiff John Papai, taken March 7, 1990.

Dated: April 12, 1990.

GRAHAM & JAMES

By: /s/ Eric Danoff
ERIC DANOFF
Attorneys for Defendant
HARBOR TUG AND
BARGE COMPANY

I. STATEMENT OF UNDISPUTED FACTS

Plaintiff John Papai was injured while painting aboard the tug PT. MARROW (the "Tug"), which was docked at Alameda. The accident occurred on March 13, 1989.

Papai was not a permanent employee of HTB. He worked at various maritime related jobs for various companies. He obtained his maritime jobs through the Inland Boatman's Union (IBU) hiring hall. (Papai, 27-28.) Since the hiring hall is closed on Saturday and Sunday, the IBU sends HTB a standby list of members to call over the weekend for jobs on the following Monday. On Sunday, March 12, Papai was on this list. HTB called him then and asked him to work the following day, and Papai agreed. (Papai, 90-94.) The job was for one day only (Papai, 42, 105-106.)

On Monday morning, March 13, at about 8:00 a.m., Papai arrived at the HTB Dock in Alameda. (Papai, 94.) HTB's Port Captain, Don Dawson, was Papai's supervisor that day. (Papai, 51-52, 95.) Dawson told Papai and Edwin Low, a co-worker, to paint the "house" (the superstructure) on the Tug. (Papai, 96-97.) The house had already received a prime coat of paint, so their job was to put on the finish coat of paint. (Papai, 97, 99.)

The Tug was tied to the dock. (Papai, 84.) The Tug was unmanned; no officers or crew members were aboard that day. (Papai, 51, 105-106.) The Tug was "dead" in the water; its engines were not running during the day. (Papai, 106.)

Papai and Low went to the Tug and began painting. They received no specific directions about how to do the work. (Papai, 96-97.) Dawson came by a couple of times during the morning. (Papai, 98-99.)

In the late morning, Dawson asked Low to shift over and work on another tug across the dock. (Papai, 99.) Low did so, and thereafter Papai worked alone. (Papai, 97.)

After a lunch break from about noon to 1230, Papai returned to the Tug and resumed painting alone. (Papai, 97-98.) No one else was aboard the Tug that afternoon. (Papai, 82, 98.)

At about 3:30 p.m., Papai was painting at the forward side of the house. He was using a portable ladder. He claims that as he was climbing down the ladder, the ladder "moved", causing him to fall off and injure his knee. (Papai, 109, 112.)

Papai began working in 1968. Between 1968-1972 he worked as a mail clerk for the federal government. (Papai, 10-11.) From 1972-1977 he owned and managed a bar. (Papai, 11-12.) From 1979-1983 he worked as a bartender at various shoreside establishments. (Papai, 15-17.) From about 1983-1986 he worked for Red & White Catering, which performed catering services for party boats and ferry boats. He worked aboard the boats but lived at home. The catering company that employed him did not own or operate the boats. His supervisor on that job worked for the caterer, not the boat owners, and he did not take any instructions from the boats' captains or crew. His job was to help stock the boat with food, set up, serve the food, and clean up afterward. (Papai, 18-21, 24-26.)

Beginning in 1987, Papai began getting jobs out of the IBU hiring hall in San Francisco. (Papai, 18-21, 24-26). From then until the date of the accident Papai worked at various jobs for various employers. Most of the jobs were for one day, but some were for two or three days. (Papai, 37-38.) The longest job he had was for 40 days working for the Golden Gate Transit District. That job consisted of chipping rust and painting on the dock at the S.F. Ferry Terminal. (Papai, 27-28.) Usually, however, once Papai finished a job for the day, he would go back to the IBU hiring hall the next day to put in for another job. He worked as a "casual." (Papai, 93.)

The jobs Papai had during the 1987-March 1989 period consisted mostly of maintenance work, deck hand work, and longshoring work. Maintenance work consisted of chipping rust and painting. This was done while boats were tied to a dock. (Papai, 29.) Deck hand work consisted mainly of manning the lines on boats during docking and undocking. That was was done on boats that were working. (Papai, 28-29.) Longshoring work consisted of helping to load and discharge vessels that were docked. (Papai, 32-33.) He also did some shoreside bartending during this period. (Papai, 33-34.) During the 1987-March 1989 period Papai lived, ate and slept at home.

In 1989, before the date of his accident, Papai had worked for HTS a total of thirteen (13) days. (Papai, Ex. 1.) The last time was about nine (9) days before the accident. (Papai, 94, 96.) Each time Papai had worked on the Tug, he had performed maintenance work only, not deck and hand work. (Papai, 57-58.) The Tug always was tied to the dock when Papai had worked on it. (Papai, 41, 51-52.) The job Papai had on the day of his accident was a one day job. (Papai, 42.) Papai was not going to sail with the Tug; he was to go back to the IBU hiring hall the next day to see if he could get another job. (Papai, 118.) Papai was paid hourly, including on the day he was injured. (Papai, 50.)

[Proof of Service Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

Date: May 18, 1990
Time: 9:30 a.m.
Courtroom: Judge Legge

DECLARATION OF MARINA V. SECCHITANO IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

I, MARINA V. SECCHITANO, declare under penalty of perjury as follows:

1. I am the Regional Director, Inlandboatman's Union of the Pacific, of which the plaintiff JOHN PAPAI is a member.

2. I dispatched Mr. Papai to the POINT BARROW to work as a deck hand on March 13, 1989.

3. A copy of the dispatch slip is attached hereto as Exhibit B.

4. Mr. Papai was specifically dispatched as a deck hand to replace one of the deck hands more regularly assigned to the POINT BARROW.

5. I have no reason to believe that the POINT BARROW was either unmanned or non-navigational on March 13, 1989.

6. The fact that no *permanent* officers or crew members were aboard does not mean that no crew members

were aboard the POINT BARROW because Mr. Papai and Mr. Low were serving as deck hands on March 13, 1989, in place of the two deck hands, which is the total complement of deck hands for a tug such as this when it is manned.

7. There is no such document as "ship's articles" for a tug such as the POINT BARROW.

8. The fact that the engines of a tug such as the POINT BARROW were not running during the day of March 13, 1989, while it was tied to the dock does not mean that this tug was "dead in the water" or somehow withdrawn from navigation. These engines often are not run unless the tug actually gets underway on its own power.

9. I have no reason to believe that the engines of the tug POINT BARROW or any related equipment were not operable on March 13, 1989.

10. The circumstances under which Mr. Papai was dispatched to the POINT BARROW are in no way similar to those discussed in the cases of *Baker v. Pacific Far East Lines*, and *Buna v. Pacific Far East Lines*, cited in defendant's motion.

11. Specifically, Mr. Papai was not dispatched on March 13, 1989, to be a member of any maintenance and repair gang; he was dispatched to the tug POINT BARROW to be a deckhand in this tug's operational crew and to spend his time aboard that tug performing work routinely done by its deck hands, which includes the painting of the tug's deck house.

12. The circumstances under which Mr. Papai was dispatched to the POINT BARROW did not leave defendant with the option of assigning him to work shoreside; shoreside jobs are dispatched differently.

13. Personnel specifically dispatched to shoreside jobs do not accrue union deck hand seniority and are neither paid nor classified as deck hands.

Executed at San Francisco, California, on April 30, 1990.

/s/ Marina V. Secchitano
MARINA V. SECCHITANO

[Certificate of Service Omitted]

I.L.W.U. DISPATCH SLIP MARINE DIVISON
INLANDBOATMEN'S UNION OF THE PACIFIC
501 ARMY STREET, SAN FRANCISCO • (415) 826-0556
32029

Date 3-13-89
Company HTB Time 0805
Dispatcher Hicks Rec. by
Classification
Job Description 1 D/H ASAP MAINT. Home Dock Alameda
Name/Book No. @ J. Papai by Phone
Social Security No.
Time Dispatched 0845 Dispatched by [illegible]

☐ Sen. ☐ Req. ☐ Stby. ☐ Perm. ☐ 1 Day ☐ Rl.

I.L.W.U. DISPATCH SLIP MARINE DIVISON
INLANDBOATMEN'S UNION OF THE PACIFIC
501 ARMY STREET, SAN FRANCISCO • (415) 826-0556
32030

Date 3-13-89
Company HTB Time 0805
Dispatcher Hicks Rec. by
Classification
Job Description 1 D/H ASAP MAINT H/D Alameda
Name/Book No. E. Low By Phone
Social Security No.
Time Dispatched 0845 Dispatched by [illegible]

☐ Sen. ☐ Req. ☐ Stby. ☐ Perm. ☐ 1 Day ☐ Rl.

I.L.W.U. DISPATCH SLIP MARINE DIVISON
INLANDBOATMEN'S UNION OF THE PACIFIC
501 ARMY STREET, SAN FRANCISCO • (415) 826-0556
32031

Date 3-13-89
Company Manson Time 0730
Dispatcher H. Hester Rec. by
Classification
Job Description 1 AB + launch Driver 1300 Richmond Wharf — Mare Island 2 weeks
Name/Book No. [illegible]
Social Security No.
Time Dispatched 1020 Dispatched by [illegible]

☐ Sen. ☐ Req. ☐ Stby. ☐ Perm. ☐ 1 Day ☐ Rl.

I.L.W.U. DISPATCH SLIP MARINE DIVISON
INLANDBOATMEN'S UNION OF THE PACIFIC
501 ARMY STREET, SAN FRANCISCO • (415) 826-0556
32032

Date 3-13-89
Company Manson Time 0730
Dispatcher H. Hester Rec. by
Classification
[illegible]

☐ Sen. ☐ Req. ☐ Stby.

I.L.W.U. DISPATCH SLIP MARINE DIVISION
INLAND[illegible]MEN'S UNION OF THE PAC[illegible] **32037**
801 ARMY STREET, SAN FRANCISCO • (415) 826-0586

Date 3-13-89
Company Harbor Tug Time 0805
Dispatcher Dawson Rec. by [illegible]
Classification Call for Orders 546-2667
Job Description: 1 D/H Maint 0800 Tues 4 days or less Alameda H/D
Name/Book No. Tracy
Social Security No.
Time Dispatched 1000 Dispatched by [signature]

☐ Sea. ☐ Reg. ☐ Stby. ☐ Perm. ☐ 1 Day ☐ Rel.

I.L.W.U. DISPATCH SLIP MARINE DIVISON
INLANDBOATMEN'S UNION OF THE PACIFIC **32038**
801 ARMY STREET, SAN FRANCISCO • (415) 826-0586

Date 3-13-89
Company Harbor Tug Time 0805
Dispatcher Dawson Rec. by [illegible]
Classification Call for Orders 546-2667
Job Description: 1 D/H Maint 0800 Tues 4 days or less Alameda H/D
Name/Book No. Bunch
Social Security No.
Time Dispatched 1000 Dispatched by [signature]

☐ Sea. ☐ Reg. ☐ Stby. ☐ Perm. ☐ 1 Day ☐ Rel.

I.L.W.U. DISPATCH SLIP MARINE DIVISON
INLANDBOATMEN'S UNION OF THE PACIFIC **32039**
801 ARMY STREET, SAN FRANCISCO • (415) 826-0586

Date MARCH 14, 1989
Company HARBOR TUG Time 0835
Dispatcher HICKS Rec. by K. EDWARDS
Classification 1 D/H 1100 4HRS
Job Description: SEA DUKE CROCKETT
BY PHONE
Name/Book No. TOM RYAN
Social Security No.
Time Dispatched ~~1000~~ 0900 Dispatched by [signature]

☐ Sea. ☐ Reg. ☐ Stby. ☐ Perm. ☐ 1 Day ☐ Rel.

I.L.W.U. DISPATCH SLIP MARINE DIVISON
INLANDBOATMEN'S UNION OF THE PACIFIC **32040**
801 ARMY STREET, SAN FRANCISCO • (415) 826-0586

Date MARCH 14, 1989
Company Golden Gate Time [illegible]
Dispatcher Hicks Rec. by K. EDWARDS
Classification 1 D/H [illegible]

☐ Sea. ☐ Reg. ☐ Stby.

MARCH 13, 1989

0730 - Henry Hester - 232-6319 - 2 weeks or more
1 AB + Driver Launch 1800 Maritime Richmond Yard Gould
1 AB " " " " QUATE

0735 George 2 AB 1200 Sea King to Vancouver Fraser + Lemsey
0805 2 D/H MAINT Alameda H/D ASAP — PAPA! Tracy LOW Bunch PT
Hicks 1 D/H 1330 - LSPR r/Dickey - CRANDALL
Howard 1 T/A 1300-2130 L'SPUR 2 days Mon-Tues. CANTRALL

HTS	HTB 257-45	GGF	T/m
Stiltz	Tracy	Pearson	Cushman
Willis	Nunter S/B Tues	Dandalen	
Lapachet	Bunch	Ramsey	
Jemingen	Papai	Sojka	
Parmelee	Lent S/O Tues	Marino	
Patterson	Low	Lapachet	

MARCH 14, 1989

L.S. Garnera 0715
1. N. ROBISON — Replac 7736 [redacted] — 8:00 A.M 560 FRIDAY
2. R. SILVA — Replac 7801 — PIER 80D
3. J. BRANSTEN
4. L. HEFFNER — 8:00 A.M 511 W.B — 3 LASHER
5. C. LITTLE — FOOT OF ADELINE
6. P. MARINO — 8:00 504 W.B 757 MATSON PINMAN
7. F. PELLOM — 1 TEMP 504 W.B REPLAC 7552
8. K. VILLEGGIANTE
9. D. VILLEGGIANTE — 9:00 A.M PIER 96 506 W.B SHIP MORELOS

MARCH 14, 1989

HICKS 0835 — 1 D/H 1100 SEA DUKE CROCKETT 4 HRS - T. RYAN
HOWARD 0910 — 1 D/H 0545-1345 LARKSPUR WEST 4 HRS 3 FRI — C. BILLINGTON R/CRAIG

HTS	HTB		GGF	T/m
1 Willis	6 R. Estrada	1. Ryan	6. Lent, Pearson	Cushman
2 Lapachet		2 Riles	7. Patterson, Patterson	
3 Jeminger 554-0231		3 Trash	Pinman	

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

FIRST AMENDED COMPLAINT FOR PERSONAL INJURIES AND DAMAGES UNDER SECTION FIVE OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT; LOSS OF CONSORTIUM

CLAIMS UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND THE GENERAL MARITIME LAW

1. *Jurisdiction*: This action arises under Section Five of the Longshoremen's and Harbor Workers' Compensation Act and the general maritime law, as hereinafter more fully appears.

2. At all relevant times, defendant owned, managed, operated and controlled the vessel, M/V POINT BARROW, (hereinafter referred to as "the vessel") and used the vessel in navigation and commerce in navigational waters.

3. At all relevant times, plaintiff JOHN PAPAI was employed by defendant as a deck hand of the vessel, and was in service of the vessel.

4. On or about March 13, 1989, while acting within the scope of his maritime employment, plaintiff JOHN PAPAI was caused to suffer serious personal injuries as the direct proximate result of the negligence of defendant, defendant's employees, agents and representatives, and the

unsafe condition of the vessel, in that defendant and the vessel:

a) failed to furnish plaintiff JOHN PAPAI with a reasonably safe place to work;

b) failed to furnish plaintiff JOHN PAPAI with reasonably safe, suitable and/or proper equipment to perform ordered tasks;

c) failed to provide plaintiff JOHN PAPAI with efficient able-bodied help so as to safely perform ordered tasks;

d) placed plaintiff JOHN PAPAI in an unsafe position under the conditions existing at the time and place of the aforementioned injuries;

e) failed to adequately inspect and ensure the proper operation of the vessel's men and machinery so as to obviate the risk of injury to its employees;

f) failed to properly maintain the vessel's equipment in good working order so as to obviate the risk of injury to its employees;

g) failed to instruct plaintiff JOHN PAPAI as to the safe and proper manner in which to perform her tasks;

h) failed to operate the vessels in a safe manner, which did render the vessels and their attendant gear, tackle and appliances unsafe;

i) failed to provide plaintiff JOHN PAPAI with a safe place to work, safe vessel and competent crew, which did render the vessel and its attendant gear, tackle, and appliances unsafe;

j) had the knowledge, ability and control to correct said unsafe conditions prior to the occurrence of the injury; and

k) otherwise breached their duties owed to plaintiff JOHN PAPAI under the circumstances.

4. As a direct and proximate result of the foregoing, plaintiff JOHN PAPAI has suffered and will continue to suffer general damages; wage loss; hospital and medical expenses; loss of earning capacity; and inability to lead a normal life.

5. At all pertinent times defendant was guilty of malice, fraud and oppression and plaintiff JOHN PAPAI should recover, in addition to actual damages, damages to make an example of and punish defendant.

CLAIMS FOR LOSS OF CONSORTIUM

6. Plaintiff JOANNA PAPAI hereby refers to and incorporates herein by this reference each and every allegation contained in paragraphs one through five of this Amended Complaint, as though fully set forth at length.

7. At all material times herein, and at present, plaintiffs JOHN and JOANNA PAPAI were husband and wife.

8. Under the general maritime law, incident to plaintiff JOHN PAPAI's claims for damages under Section Five of the Longshoremen's and Harbor Workers' Compensation Act, plaintiff JOANNA PAPAI is likewise entitled and empowered to recover loss of care, comfort and society, support and enjoyment of her husband, proximately caused by defendant's negligence and the unsafe conditions of its vessel.

9. In her own right, plaintiff JOANNA PAPAI, seeks damages against defendant, incident to recovery by plaintiff JOHN PAPAI, in a sum in excess of $500,000.00, which sum represents a fair and reasonable estimate of the monetary value of the loss of care, comfort, society, enjoyment and support which JOANNA PAPAI has endured as a result of the injury to her husband JOHN PAPAI.

WHEREFORE, plaintiff prays judgment against defendants and each of them, as follows:

(1) for general damages in a sum according to proof and in excess of $1,000,000.00;

(2) for medical expenses, past and future, according to proof;

(3) for loss of earnings, past and future, according to proof;

(4) for damages for loss of consortium on behalf of plaintiffs JOANNA PAPAI, in a sum inexcess of $500,000.00;

(6) for such other and further relief as the Court may deem just and proper.

SULLIVAN, JOHNSON & BOYLE

/s/ Thomas J. Boyle
THOMAS J. BOYLE
Attorneys for Plaintiffs
John Papai and Joanna Papai

JURY TRIAL DEMANDED

Plaintiffs hereby demand trial by jury.

SULLIVAN, JOHNSON & BOYLE

/s/ Thomas J. Boyle
THOMAS J. BOYLE
Attorneys for Plaintiffs
John Papai and Joanna Papai

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

Date: February 28, 1992
Time: 9:30 a.m.
Courtroom: Judge Legge

DECLARATION OF THOMAS J. BOYLE

I, Thomas J. Boyle, am an attorney with SULLIVAN, JOHNSON & BOYLE, 100 Pine Street, 27th Floor, San Francisco, California, attorneys for Plaintiffs John Papai and Joanna Papai. On July 9, 1990 I attended the deposition of Marina V. Secchitano. Attached hereto are copies of pages from the transcript of that deposition.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct to the best of my knowledge.

Executed in San Francisco, California on February 14, 1992.

/s/ Thomas J. Boyle
THOMAS J. BOYLE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

DEPOSITION OF MARINA V. SECCHITANO

July 9, 1990

* * * *

[14] Q. What did you review?
A. I think everything in my file here.
Q. Did you do that to help prepare for this deposition?
A. Yes.
Q. May I see what's in your file, please?
A. Sure.
Q. The first thing in the file is something called Deckhands Agreement. What is your understanding as to what this is, this agreement?
A. I don't understand the question.
Q. You have the Deckhands Agreement in the John Papai file. What is it about this agreement that is relevant, in your mind, to John Papai's case?
A. The section where it refers to maintenance, to what compensation will be paid someone working under that labor agreement.
Q. Can you tell me what section that is?
A. Maintenance and cure.
Q. So article 12. Is this the article that you were referring to?
A. Yes.

* * * *

[21] Q. Attached to the declaration as Exhibit B are some records. What do you call these records?
A. IBU dispatch slips.

Q. Are the IBU dispatch slips attached as Exhibit B in your handwriting?
A. Yes.
Q. Now, Mr. Papai has stated that his work on March 13, which was a Monday, started at 8:00 a.m. and that he received a phone call on Sunday night from HTB to come on Monday.
Is your information any different from that?
A. Yes.
Q. What is your understanding as to how Mr. Papai was dispatched for the job on March 13?
A. The dispatch slip indicates that he was telephoned at 8:45 March 13th to go to work as a deckhand as soon as possible.
Q. Is there a list prepared for Harbor Tug and Barge —strike that.
During a weekday other than Monday, if Harbor Tug and Barge wants an IBU member to come out and work, how is it that a worker is assigned?
A. I don't understand the question.

* * * *

[45] Q. Is there some category of IBU members that are shoreside and a different category that are non-shoreside?
A. Yes.
Q. Is Mr. Papai in a category that is exclusively non-shoreside?
A. Yes.
Q. What is the shoreside category?
A. Terminal attendant for Golden Gate Ferry.
Q. Is that the only shoreside—
A. Grounds keeper for Harbor Tours.
Q. Are those the people who are not qualified to be deckhands?
A. Correct.
Q. Can somebody who is qualified to be a deckhand be, if they want to be, assigned to a shoreside job?
A. I don't understand the question.

Q. If Mr. Papai said, I want the next available shoreside job, I'm willing to wait, could he be assigned to that job if his card came up?

A. I'm still not clear on what you mean. Could you rephrase that. I generally don't understand.

* * * *

[54] Q. Is there any union rule that makes a distinction between a deckhand and deckhand maintenance man?

A. Qualified, I think is the term.

Q. Qualified what?

A. If you ask for someone to do maintenance, as the employer, we are obligated to send you someone that can do maintenance.

Q. Maintenance can be painting?

A. Can be. It's in the agreement.

Q. Can be chipping?

A. Can be.

Q. Can be splicing?

A. Can be. All things that you don't need to know at Golden Gate Ferry per se or Harbor Tours per se.

Q. If Harbor Tug and Barge calls in and wants a deckhand to do maintenance and somebody on the A list has seniority and has his card in and wants the job, do you do any further investigation as to whether that person can splice rope or do other things?

A. We ask them.

* * * *

EXCERPTS FROM

HARBOR TUG AND BARGE COMPANY

AND

INLANDBOATMAN'S UNION OF THE PACIFIC

DECKHANDS AGREEMENT

* * * *

TOWBOAT AGREEMENT

PREAMBLE: The rules contained herein constitute agreements made by and between HARBOR TUG AND BARGE COMPANY, herein referred to as the "Employer", and the INLANDBOATMEN'S UNION OF THE PACIFIC, ILWU, MARINE DIVISION, herein referred to as the "Union", prescribing duties, wages, hours, manning and other terms and conditions of employment on vessels of the Employer:

WITNESSETH:

GENERAL RULES

Article 1. Union Shop, Seniority & Method of Employment

By separate agreement the Employer and the Union have agreed to and established terms providing for Union Security and Method of Employment procedures.

Article 2. Equal Opportunity

During the term of this Agreement neither party shall discriminate against any employee or applicant for employment because of race, color, sex, age, religion, national origin, handicap, or status as a disabled veteran or Vietnam era veteran. This nondiscrimination policy shall include, but not be limited to, the following: employment, promotion, upgrading, transfer, layoff, demo-

tion, termination, rates of pay, forms of compensation, recruitment advertising and selection for training.

The Employer shall not discriminate against any employee for his or her activity in behalf of or membership in the Union.

Article 3. Compliance with Law

(a) The Employer and the Union agree that in the event any provision or provisions of this Agreement are held to be void as being in contravention of any laws, rules or regulations, nevertheless, the remainder of this Agreement will remain in full force and effect, and the parties shall immediately meet to negotiate new provisions to replace the void provisions. It is further agreed that each article of this Agreement is separate and distinct and would have been entered into without regard for any other article.

(b) It is mutually agreed that the Employer and the Union will comply fully with all provisions of all Federal laws, State and local laws, and Presidential Executive Orders, all to the end that no person shall improperly be excluded from participation in, or be denied the benefits of full access to, the procedures of Article 1 of this Agreement, or be otherwise subjected to discrimination.

Article 4. Agreement May Not Be Amended Except by Written Document

The parties realize that not infrequently, after agreements similar in part to this Agreement have been executed, one party thereto will contend that the other party has at some time during negotiations agreed to amend, modify, change, alter or waive one or more provisions of the Agreement, or that by the action or inaction of such other party, the Agreement has been amended, modified, changed or altered in some respect. With this realization in mind and in order to prevent such contention being

made by either party hereto, insofar as this Agreement is concerned, the parties have agreed to and do hereby agree that no provision or term of this Agreement may be amended, modified, changed, altered or waived except by a written document executed by the parties hereto.

* * * *

Article 11. Disability Pension and Health and Welfare Contributions

If an employee becomes disabled and the disability is occupational (occurring on the job) the Employer agrees to continue paying his Pension and Health and Welfare Plan contributions for a period of up to one (1) year of bona fide disability.

In no case will the Employer pay more than the maximum straight time monthly hours.

Article 12. Maintenance and Cure

(a) Crew members are entitled to maintenance and cure, on account of injury or illness incurred in the service of the vessel, and shall be paid maintenance at the rate of twenty-two dollars ($22.00) per day. Except in hardship cases, the Employer shall not be required to make payments under this rule more often than semi-monthly.

Under the above provision, wages, maintenance and cure shall be paid promptly on presentation of a medical record indicating generally the nature of the illness or injury.

Wages, maintenance and cure shall not be withheld in any case merely because the claimant has also submitted a claim for damages or has filed suit therefor or is taking steps to that end.

If the disability is caused by injury received in the service of the employer, and all weekly disability benefits have been exhausted, and proof of termination of these

benefits has been provided to the company by the employee, than the rate at which maintenance is paid shall be increased to thirty-five ($35) dollars per day.

* * * *

(i) Employee may be granted leaves of absence limited, except in case of physical disability, to six months in any year, without loss of seniority. Retention of seniority during a longer leave of absence may be arranged by agreement between the Employer and the Union. Leaves of absence will not be granted to employee to work in other industries or companies unless mutually agreed to between the Employer and the Union. Any leaves of absence shall be reduced to writing with an approved copy sent to the Union.

Article 23. Wages

(a) The minimum basic rates of pay shall not be less than the following:

Classifications	9/15/87 Hourly	9/15/90 Hourly	9/15/91 Hourly
Qualified D/H Cook S.T. Hourly Rate	$16.41	$16.90	$17.41
Qualified D/H S.T. Hourly Rate	$15.86	$16.34	$16.83

Employees hired into the Qualified Deckhand classification on or after ratification of this agreement with less than 750 hours of work with a CMC tugboat company within the preceding two (2) years, will receive fifteen percent (15%) reduction in the published wage rate for the qualified deckhand. That fifteen percent (15%) reduction shall remain in effect for the first 750 hours worked in the qualified deckhand classification.

Upon completion of the first 750 hours of work in the Qualified Deckhand classification, the employee shall receive a seven and one-half percent (7½%) pay increase. This new rate will remain in effect through the subsequent 750 hours of work. At the conclusion of this second 750 hours of work, the individual will be paid as a fully Qualified Deckhand.

Those individuals not having the required 750 hours with a CMC tugboat company but having like experience will be considered on a case by case basis.

(b) In addition to wages stipulated herein, soaps, towels, linens weekly when required, and other essential supplies within reason, will be provided.

(c) Where subsistence is not furnished, employees classified herein will be paid subsistence of seven dollars ($7.00) for work exceeding four (4) hours or fifteen ($15.00) for work exceeding eight (8) hours. Subsistence allowance shall not exceed fifteen dollars ($15.00) in any twenty-four (24) hour period.

When subsistence is furnished on the boats, reasonable grocery orders will be filled as ordered. Shortages will be made up within twenty-four (24) hours. No dated food shall be given that will expire during the shift.

(d) In order to be employed as a qualified deckhand, he or she must provide, if requested to do so to the satisfaction of the Employer, that he or she:

1. Has good knowledge of vessels lines and towing winch, the placement, use and names of same.
2. Has fair knowledge of splicing lines.
3. Is a satisfactory helmsman and lookout.
4. Can satisfactorily chip, scale and care for the metal parts of a vessel.
5. Can satisfactorily paint when requested and do the necessary cleaning chores upon completion for the day.

6. Can properly care for and use tools.

7. Can do such other things required of a deckhand in order to work safely.

Any person who is classified as a qualified deckhand shall not be reduced in rating.

(e) Casual employees will be paid twelve (12) hours straight time when working on twenty-four (24 hour boats. Overtime will be paid for hours worked in excess of twelve (12) hours. When a casual is replacing a regular employee as a vacation or sick relief he/she shall be entitled to the same guarantee as the regular employee replaced. Any employee who has less than one (1) year company seniority shall receive vacation pay for each and every hour worked or paid for as follows:

Take the existing monthly wage and multiply it times twelve (12) months, divide the result by twenty-six (26) weeks, divide the result by two thousand seventy-six (2,076) hours. This figure equals the hourly rate of vacation pay in cents. (Round to the nearest full cent.) The total accumulated vacation pay shall not exceed the amount of vacation pay for a regular Deckhand in any twelve (12) month period.

(f) a Deckhand/Cook, when carried aboard, will work as a swing person, performing duties as required. The duties of this position will include, but not be limited to, cooking, storing of the vessel, deck maintenance and repair.

Article 24. Overtime

(a) Overtime at time-and-a-half the regular straight-time rate shall be paid for:

(1) hours worked in excess of 12 hours a day;

(2) hours worked on the employee's designated days off;

(3) all hours worked on the 7th day.

* * * *

(c) Employees shall not be required to work Thanksgiving Day, Christmas Day, or New Year's Day, and will not be discriminated against for refusal to work these days.

Article 30. Maintenance Work and Duties

(a) During the time on duty the deckhand's duties shall consist of tying up and letting go as required by the operation and normal maintenance work on the boat shall be performed during the hours of eight (8:00) a.m. to four (4:00) p.m. No maintenance work shall be required on Sundays or holidays.

(b) Deckhands will be required to perform maintenance work in the engine room.

(c) Sanitary work shall be performed as needed any time, but no unessential sanitary work shall be required on Sundays or holidays, or at night that could be deferred until the next day.

It is the considered opinion of all parties that each employee should adequately maintain his/her vessel within these limits. All employees shall share equally in this responsibility.

(d) The on-watch deckhand shall conduct a check of the engine room status a minimum of two (2) times each watch while underway for vessel safety reasons and report same to the operator.

* * * *

Letter of Understanding—1

to the Agreement

Between

Harbor Tug and Barge Company

and the

Inlandboatmen's Union of the Pacific,

Marine Division of the International

Longshoremen's and Warehousemen's Union

San Francisco Region

The above parties agree as follows:

During the term of the Agreement, it is agreed the Union will refer applicants, who have not previously been employed by Harbor Tug and Barge Company, for interview prior to his/her being dispatched for work through the Union's Hiring Hall.

Signed for the Employer:	Signed for the Union:
By /s/ [Illegible]	By /s/ [Illegible]
Date 7/8/88	Date 7/8/88

Letter of Understanding—4

to the Agreement

Between

Harbor Tug and Barge Company

and the

Inlandboatmen's Union of the Pacific,

Marine Division of the International

Longshoremen's and Warehousemen's Union

San Francisco Region

The above parties agree as follows:

During the term of the Agreement, a dispatch procedure for other than 7-day-on/7-day-off vessel Deckhands will be developed and established. The Deckhand unit will decide upon the dispatch procedure to be placed in effect and the date of its implementation.

It is understood that the procedure currently in effect will continue until such time as a new procedure is developed and placed in effect.

Signed for the Employer:	Signed for the Union:
By /s/ [Illegible]	By /s/ [Illegible]
Date 7/8/88	Date 7/8/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

Date: February 28, 1992
Time: 9:30 a.m.
Courtroom: Judge Legge

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

Defendant and the Inland Boatman's Union of the Pacific (IBU) are parties to a Deckhands Agreement, (Secchitano Deposition page 14 line 22) which requires that all HTB deckhands be members of the IBU (2) at 8:05 a.m. on March 13, 1989, a representative of HTB telephoned the IBU hiring hall, requesting two deckhands to perform maintenance that day on HTB's tug, Point Barrow, at the Home Dock in Alameda (Secchitano Deposition page 21 lines 15-17) and that under the union contract, maintenance, including painting, is an integral part of the of the duties of a deckhand. (Secchitano Deposition page 54 lines 3-23).

Papai, an IBU member works exclusively non-shoreside had already worked for defendant as a deckhand on 12 previous occasions in 1989. (Secchitano Deposition page 45 lines 5-7).

SULLIVAN, JOHNSON & BOYLE

/s/ Thomas J. Boyle
THOMAS J. BOYLE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

San Francisco, California
December 16, 1992

COURT'S RULINGS

EXCERPTED TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES A. LEGGE, JUDGE

* * * *

[2] THE CLERK: Calling Civil 90-0111, John Papai, et al., v. Harbor Tug and Barge, et al.

Counsel, state your appearances.

MR. BOYLE: Thomas Boyle for Plaintiffs.

MR. DANOFF: Eric Danoff of Graham & James for the Defendant Harbor Tug and Barge.

THE COURT: All right.

THE COURT: All right.

The case has been tried over a period of several days to the Court, sitting without a jury. And then post-trial briefs have been filed.

And I read the deposition of Captain Mc Isaac that was submitted to me. I've, of course, heard the evidence. And I've gone back and reviewed my notes of the evidence. And I have reviewed the exhibits which have been submitted.

I'm prepared to rule at this time on the liability question.

Now, first of all, the legal framework in which we find ourselves.

The case initially started out as a seaman's case. I made a determination early in the case that I did not believe Mr. Papai was a seaman, and hence not entitled to the Jones Act [3] and doctrine of unseaworthiness benefits.

So the action—and that is a conclusion which I reaffirm. And of course is a subject which Mr. Papai is free to take up with the Court of Appeals.

The legal issues, therefore, in this case in the trial before me are framed under Section 905(b) of the Longshore and Harbor Workers' Act, and general principles of negligence.

And it's of course clear that the plaintiff bears the burden of proof by a preponderance of the evidence.

A few other legal matters.

I think that the defendant's duties as the operator of the tug are governed by the principles set forth by the U.S. Supreme Court in the Scindia, S-c-i-n-d-i-a, decision.

And I believe that the defense is correct that the defendant here can be liable only as the operator or the tug. And if things were done in its capacity as the employer of Mr. Papai, rather than his operator, there can't be liability.

With respect to the OSHA standards, I think everybody now agrees that the OSHA standards are relevant to determining the question of duty of care. Not necessarily controlling, no per se rule; and, of course, they do not answer the question of who has the duty to comply with the standard of care.

Now, what happened?

We have no evidence of what—of how the accident occurred, and what occurred there, other than Mr. Papai's [4] testimony. That is, it's a somewhat unusual case in which there is nobody at the scene. Even Mr. Low comes along a bit later.

So it's really Mr. Papai's testimony that has to establish that there was something the matter with the arrangements that he was given, and in essence to prove that the ladder slipped. And he did say that during his trial testimony.

So I think that the question really in determining liability is a search for corroboration, and it's a search for credibility.

On the issue of corroboration we really have only one thing—and maybe not even that—that supports Mr. Papai's version, and that is the trial testimony of Mr. Low.

However, Mr. Low, as a witness, I don't think has a great deal of credibility. I think his demeanor on the witness stand was such that he's—can be kind of led into saying whatever anybody on either side of the case wants him to say at the moment.

And indeed his testimony in the trial was inconsistent with the testimony of Mr. Michel, dealing with Mr. Michel's interview with Mr. Low back in 1989.

The other corroboration; that is, the other evidence that we could look to for corroboration, is really totally against Mr. Papai.

That is, the record at the time establishes the exact contrary of what Mr. Papai wants to establish and testify to at [5] trial: his statements to Dawson; his statements to Clinton; the formal—formal injury report, which I recognize is not prepared by Mr. Papai, but obviously the preparer of it was attempting to relate what he was told.

We don't have any instances in which Mr. Papai, other than on the witness stand, says the ladder slipped or was defective.

The accident report he gives to his doctor says that he missed the last step, twisted his knee, and fell.

According to Michel, Low said that Papai slipped and hit his knee on a rung while climbing down the ladder.

His deposition testimony is equivocal, in the sense he says he doesn't really remember what happened.

I realize that's in the context of quite a bit of other testimony.

And there is the fact that the ladder remained upright, for whatever weight that might have.

What I'm saying is that the search for corroboration produces none. And indeed produces a lot of matters inconsistent with Mr. Papai's statements at trial about how the accident occurred.

Dealing with the general subject of credibility, I think Mr. Papai is an honest and straightforward person. But I do have some questions about his statements in connection with the case; the general question of credibility, totally apart [6] from the—well, I shouldn't say "apart"; I've already recited the matters where I believe Mr. Papai's statement at trial was inconsistent with his other testimony.

In addition, I find it difficult to fathom that Mr. Papai in going to a doctor and seeking treatment for his knee, and compensation for his knee injury, doesn't disclose the fact of his prior operation on the same knee.

I also think his testimony regarding what he was doing in trying to look for a job and get himself retrained was really straining credibility also.

Mr. Papai is an intelligent person. He's—he has a gift of intelligence that's above standard, above level. I believe there are a lot of positions that are open and available for him, if he would pursue the effort of finding them.

The fact is that the whole case, the liability case, the causation, the damages, the medical, the other, just seems to have been pushed to the utmost limit by Mr. Papai, and perhaps by his counsel, without really a lot of solid evidence—or much solid evidence to back it up.

So I am finding by a preponderance of the evidence that Mr. Papai has not sustained his burden of proof on liability; that the ladder did not slip, but that Mr. Papai was instead injured by slipping, or missing a rung, or . . . improperly stepping down, however you want to frame it.

I also believe that Mr.—that the defense has [7] established that Mr. Papai did have some choices. He may perhaps not be the type of person to avail himself of those choices, particularly when it may put him in a confrontational position with his employer, but I think he did have choices as to what tools and what equipment to use. And that he, as much as anyone else, made the choice of which ladder and which equipment to use and how to go about using it.

So for all those reasons I am finding that Mr. Papai has not sustained his burden of proof on the issue of negligence, either under 905 of the Act, or under general negligence principles.

So the question of liability must be determined in favor of the defense, and against the plaintiff.

So I then need not proceed to questions dealing with the medical or economic aspects of damages.

So I will direct that judgment be entered in favor of the defendant. And ask that . . . the defendant submit a proposed form of order, and a proposed form—well I guess just a proposed form of judgment is all we need, And state on the record—state in the judgment that I have given the reasons for my . . . conclusions and findings and judgment on the record in open court.

So in the event that Mr. Papai appeals the court of appeals will have my comments in one place.

I might say, Mr. Boyle, I think you did all you could. [8] I can't conceive a better presentation or . . . a more vigorous prosecution of it, but I just don't think the evidence was able to sustain it.

But I think you did as good a job as you possibly could.

MRS. PAPAI: (From audience of courtroom) Judge . . .

THE COURT: Yes, ma'am.

MRS. PAPAI: . . . my husband is probably one of the most honest men—

MR. BOYLE: Mrs. Papai—

MRS. PAPAI: —God ever created—

MR. BOYLE: —I dont—
MRS. PAPAI: —and he is not someone to tell lies—
MR. BOYLE: Mrs. Papai, I don't want you to—
THE COURT: Well, just a second.
MRS. PAPAI.—he's not someone who would be able to figure out what you need to hear—
THE COURT: Ma'am—
MRS. PAPAI: And he just didn't know what to tell you.
He told me that night that he came home the ladder went out from under him.
And I don't care what you people in suits say.

(Mrs. Papai leaving courtroom.)

MR. BOYLE: Sorry, Your Honor.
[9] THE COURT: Well, that's quite all right, Mr. Boyle.
She's certainly entitled to express her feelings on the subject, and I'm sure she has a direct personal interest in it.
And litigants often don't understand that both you, as lawyers on both sides, and I, as a judge, have to make our decisions based upon the record of admissible evidence.
And husbands and wives and friends do have feelings about these things.
All right. Thank you very much, counsel.
MR. DANOFF:Thank you, Your Honor.

[Certificate of Reporter Omitted]

(6)

No. 95-1621

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONER

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53 pp

QUESTIONS PRESENTED

I. Can an injured land-based maritime worker sue for seaman remedies after an Administrative Law Judge has formally determined that he was an LHWCA worker and not a seaman at the time of the injury?

II. Is a claimant's status as a seaman to be determined by his work history with his employer at the time of the injury, or by his entire work history?

PARTIES TO THE ACTION

Plaintiffs/Respondents:

John Papai and Joanna Papai.

Defendant/Petitioner:

Harbor Tug and Barge Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Harbor Tug and Barge Company discloses that it formerly was a California corporation, and that on August 1, 1992 it was merged into Crowley Marine Services, Inc., a Delaware corporation. Crowley Marine Services, Inc. (which has no subsidiaries that are not wholly owned) is a wholly owned subsidiary of Crowley Maritime Corporation, a California corporation.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit dated September 25, 1995, is reported at 67 F.3d 203 (9th Cir. 1995) and is reproduced in Appendix A to the Petition For Writ of Certiorari ("Pet. App."), pp. 1a-19a. The Court of Appeals' unreported Order dated December 12, 1995, denying Harbor Tug and Barge Company's petition for rehearing or rehearing *en banc* is reproduced in Appendix B at Pet. App. pp. 20a-21a.

The following unreported rulings of the District Court are reproduced in the Appendices to the Petition: Order Granting Partial Summary Judgment To Defendant Harbor Tug and Barge Company, May 29, 1990, Appendix C, Pet. App. pp. 22a-23a; Order Of Denial Of Reconsideration And Statement Of Grounds For Immediate Appeal, August 17, 1990, Appendix D, Pet. App. pp. 24a-25a; Order Confirming Summary Adjudication That Plaintiff Was Not A Seaman, April 6, 1992, Appendix E, Pet. App. pp. 26a-27a; and Judgment In Favor Of Defendant

Harbor Tug And Barge Company, December 28, 1992, Appendix F, Pet. App. pp. 28a-29a.

The unreported Decision and Order of Administrative Law Judge Paul Mapes dated August 27, 1992, in Case No. 92-LHC-403, OWCP No. 13-85230, is reproduced in Appendix G at Pet. App. pp. 30a-57a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was issued on September 25, 1995. On October 6, 1995, Harbor Tug and Barge Company duly filed its Petition for Rehearing or Rehearing *En Banc*, which the Ninth Circuit denied by Order dated December 12, 1995. This Court granted the Petition For Writ of Certiorari on October 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes involved in this case are: (i) 33 U.S.C. § 902(3)(G), reproduced in Appendix H at Pet. App. p. 58a. This section is part of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.*; (ii) 33 U.S.C. § 905(a), quoted in the brief; (iii) 46 U.S.C. § 688(a), the "Jones Act." The relevant portion of § 688(a) is reproduced in Appendix H at Pet. App. p. 58a.

STATEMENT OF THE CASE

A. Statement Of Facts.

1. *The Accident.*

Respondent John Papai ("Papai") injured his knee while painting aboard the tug PT. BARROW (the "Tug"), which was docked at Alameda, California. The Tug was operated by petitioner Harbor Tug and Barge Company ("HTB").

Papai was not a permanent employee of HTB and was not permanently assigned to the Tug. He worked at various maritime related jobs for various companies. (J.A.

29-30.)[1] He obtained his maritime jobs through the Inland Boatman's Union ("IBU") hiring hall. (J.A. 29-30.) The job he was performing on the day he was injured was a one-day maintenance painting job. (J.A. 35, 48.)

On the morning of March 13, 1989, Papai arrived at the HTB Dock in Alameda. (J.A. 43.) Don Dawson of HTB, a shoreside port captain who was Papai's supervisor that day, told Papai and Edwin Low, a co-worker, to paint the "house" (the superstructure) on the Tug. (J.A. 37-45.)

The Tug was tied to the dock and was unmanned; no operational crew members were aboard that day. Papai did not take any orders from any Tug officers. (J.A. 36-37, 39, 47-48.) The engines of the Tug were not running while Papai was aboard. (J.A. 48.)

Papai and Low went to the Tug and began painting. In the late morning, Dawson asked Low to leave the Tug and work on another HTB tug nearby. Low did so, and thereafter Papai worked alone. (J.A. 39-40, 45-47.)

At about 3.30 p.m. Papai was painting the forward side of the house, using a portable ladder. He alleges that as he was climbing down, the ladder "moved," causing him to fall and injure his knee. (J.A. 49-50.)

2. *Papai's Work History.*

Papai entered the work force in 1968. Between 1968 and 1972 he worked as a mail clerk for the federal government. From 1972 through 1977 he owned and managed a bar. From 1979 to 1983 he worked as a bartender at various shoreside establishments. During the 1983-1986 period, he worked for a company that performed catering services for party and ferry boats. He worked aboard the boats but did not live on them. The catering company that employed him did not own or operate the vessels. His job was to help stock the vessels with food, set up, serve the food, and clean up afterward. (J.A. 20-27.)

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[1] "J.A." references are to the Joint Appendix.

In 1987 Papai began to obtain short-term jobs out of the IBU hiring hall in San Francisco, California. From then until the date of the accident in March 1989 Papai worked at various jobs for various employers. (J.A. 29-30.) Most of the jobs were for a single day, but some were for two or three days. (J.A. 34.) The longest employment Papai had while working out of the IBU hiring hall was for 40 days, during which he worked for the Golden Gate Transit District chipping rust and painting the dock at the San Francisco Ferry Terminal. (J.A. 29-30.) Usually, however, once Papai finished a job for the day, he returned to the IBU hiring hall the next day to bid for another job. (J.A. 34.)

The maritime jobs Papai had during the 1987-March 1989 period included maintenance jobs, seagoing deckhand jobs, and longshoring jobs. Maintenance jobs consisted of chipping rust and painting. This was done while the vessels were tied to a dock. Seagoing deckhand jobs (which constituted the majority of his jobs) consisted mainly of manning the lines on working boats during docking and undocking. Longshoring jobs consisted of helping to load and discharge vessels that were docked. (J.A. 30-32.) Papai also did some shoreside bartending during this period. (J.A. 32-33.)

From January 1, 1989 until March 13, 1989, the date of the accident, Papai occasionally worked for HTB, for a total of thirteen days. He last worked for HTB about nine days before the accident, on a different tug. (J.A. 44.) Although Papai had worked on the PT. BARROW a few times, he had performed only maintenance work, chipping rust and painting. (J.A. 34-35, 38.) During these prior jobs on the PT. BARROW, the Tug had always been tied to the dock. (J.A. 34-35.) After each day's work on the Tug, Papai went home; he did not live on the Tug. (J.A. 35.)

Papai's employment on the day of the accident was, like his prior work on the Tug, a one-day job. (J.A. 35, 48.) Although his job title was "deckhand," he knew

before starting that the work was a maintenance painting job rather than a seagoing deckhand job, and that the Tug would remain tied to the dock. (J.A. 44.) Papai was not going to sail with the Tug; he planned to return to the IBU hiring hall the next day to bid for another job. (J.A. 35, 48, 50-51.)

B. Procedural History Of The Case.

1. *Papai's Civil Action.*

In January 1990 Papai filed his Complaint against HTB in the U.S. District Court for the Northern District of California, seeking damages for personal injuries, and alleging causes of action for negligence under the Jones Act (46 U.S.C. § 688) and for unseaworthiness under the general maritime law. (J.A. 14-18.) Papai could assert such causes of action only if he was a "seaman" at the time of his accident. In April 1990 HTB moved for summary adjudication that at the time of the accident Papai was not a seaman. The District Court (Judge Charles A. Legge) granted HTB's Motion by Order dated May 29, 1990. (Pet. App. pp. 22a-23a.)

In May 1990 Papai filed a First Amended Complaint against HTB for damages for personal injuries, asserting a cause of action for negligence under § 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.*, and under general negligence principles. (J.A. 63-66.)

In June 1990 Papai moved for reconsideration of the District Court's determination that he was not a seaman. By Order dated August 17, 1990, the Court denied the Motion and reaffirmed that Papai was not a seaman. (Pet. App. pp. 24a-25a.) Following two subsequent U.S. Supreme Court decisions concerning seaman status,[2] the Dis-

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[2] *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991).

trict Court asked for further briefing on the seaman status issue. On April 6, 1992, following that briefing, the District Court issued an order confirming that at the time of the accident Papai was not a seaman within the meaning of the Jones Act or the general maritime law. The Court found that Papai "did not have a 'more or less permanent connection' with the vessel on which he was injured nor did he perform substantial work on the vessel sufficient for seaman status." (Pet. App. pp. 26a-27a.)

Trial was to the District Court without a jury in August-September 1992. The Court held that Papai had failed to establish any negligence by HTB under either § 905(b) of the LHWCA or under general negligence principles. (J.A. 81-86.) The District Court therefore issued a Judgment in favor of HTB. (Pet. App. pp. 28a-29a.) Papai appealed to the Ninth Circuit Court of Appeals.

2. *Papai's LHWCA Compensation Action.*

While Papai's civil action was pending, his LHWCA compensation action also was underway. Soon after his injury, Papai had made a claim against HTB under the LHWCA for compensation and medical benefits. HTB paid Papai those benefits on an interim basis. Papai and HTB disputed several LHWCA compensation issues, however, including LHWCA coverage (which depended upon Papai's status as an LHWCA worker or a seaman). Members of the crew of a vessel (*i.e.*, seamen) are excluded from LHWCA coverage and are not entitled to LHWCA benefits. 33 U.S.C. § 902(3)(G).

LHWCA compensation issues are determined by formal administrative trials before an Administrative Law Judge ("ALJ"). On June 2, 1992, ALJ Paul Mapes held a formal trial in the LHWCA case. He received oral testimony, deposition testimony, exhibits, and briefing by the parties. On August 27, 1992, the ALJ issued his written Decision and Order. (Pet. App. pp. 30a-57a.)

In his decision the ALJ addressed in detail the issue of Papai's status as an LHWCA worker or as a seaman.[3] In the LHWCA compensation action, Papai asserted that he was an LHWCA worker rather than a seaman, and that he therefore was entitled to compensation under the LHWCA. HTB took the position in the LHWCA compensation action that if Papai was a seaman, as he was asserting in the civil action, then he was excluded from LHWCA coverage.

The ALJ held that the evidence showed that Papai was an LHWCA worker, not a seaman, and thus that Papai was entitled to LHWCA compensation benefits.[4] (Pet. App. pp. 34a-37a.) On that basis the ALJ made a formal award of benefits to Papai. (Pet. App. pp. 54a-55a.) Papai has received those benefits.

A decision by an ALJ in an LHWCA compensation case can be appealed to the Benefits Review Board ("BRB"), and from the BRB to the Court of Appeals. 33 U.S.C. § 921; 20 CFR Parts 801-2. Neither Papai nor HTB appealed the ALJ's Decision and Order of August 27, 1992. Thus it became final and binding.

3. *The Appeal Of The Civil Action.*

On September 25, 1995, the Court of Appeals below (Judge Poole dissenting) reversed the District Court's ruling on summary adjudication that Papai was not a seaman, and it held that a jury should have decided that

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[3] The ALJ was aware of the District Court's Orders re seaman status. However the ALJ considered these Orders to be interlocutory in nature. Pet. App. p. 35a, fn. 2.

[4] The ALJ, based upon the evidence presented at the LHWCA hearing, found that all of Papai's jobs were obtained through the union hiring hall, that none of his jobs lasted more than two or three days at a time, that he had a variety of different employers and worked on a variety of different ships, that he lived on shore and not on the ships, that (although he had worked aboard the Tug before) the job he was performing on the date of injury was of only one day's duration, and that his assignment to any vessel or fleet of vessels was random, sporadic, and transitory. (Pet. App. p. 37a.)

issue. (67 F.3d 203, Pet. App. pp. 1a-19a.) The Court of Appeals also held that the ALJ's decision that Papai was an LHWCA worker and not a seaman did not bar Papai's claim to seaman remedies in the civil action.

SUMMARY OF ARGUMENT

The Formal Award Of LHWCA Compensation Benefits Should Preclude Further Claim To Seaman Remedies.

The remedies for injured maritime workers covered by the LHWCA and those for seamen are mutually exclusive. While an injured maritime worker may pursue both remedies until a determination is made of his entitlement to LHWCA benefits, once he is formally awarded those benefits, the claimant should not be allowed to seek seaman remedies. This is mandated by § 905(a) of the LHWCA and supported by the Congressional intent as expressed in the legislative history. Also, the doctrine of administrative collateral estoppel precludes seaman remedies once an Administrative Law Judge has determined that a claimant is covered by the LHWCA. An administrative determination of the claimant's status as an LHWCA worker and not a seaman should be given binding recognition. To preclude the claimant from seeking a second remedy comports with Congressional intent, avoids unjust and inconsistent status determinations, and avoids duplicative judicial proceedings over the same subject matter. In this case, the ALJ determined that Papai was an LHWCA worker, not a seaman, and granted him LHWCA benefits. Thus he should be precluded from further seeking seaman remedies.

A Claimant's Status As A Seaman Should Be Based Upon His Connection To The Vessel To Which He Is Assigned When Injured Or, In Certain Circumstances, An Identifiable Group Of Vessels Belonging To His Employer.

A prerequisite for seaman status is that the claimant have a substantial connection to the vessel to which he is

assigned when the injury occurs. Under certain limited circumstances known as the Fleet Seaman Doctrine, however, the claimant's relationship to several or all of the employer's vessels may be considered. This doctrine has been applied when the claimant is a steady employee who regularly performs seaman's work for a specific employer on multiple vessels belonging to that employer, to none of which he has a permanent or substantial connection. The Court of Appeals' decision below greatly expands the seaman status test by allowing the trier of fact to consider the claimant's entire work history, including his connection with all the vessels on which he has worked for all of his employers. The Court of Appeals' opinion on this point, which is based upon a misreading of dictum in the recent Supreme Court decision in *Chandris, Inc. v. Latsis*, —— U.S. ——, 115 S.Ct. 2172, 132 L.Ed. 2d 314 (1995), has no basis in precedent. The Court of Appeals' test would make seaman status unpredictable because it would be based upon virtually unlimited jury discretion to consider the claimant's past or subsequent sea service. The special remedies appertaining to seaman status should be accorded to seamen in being, not to former or expectant seamen. Whether a claimant has seaman status should be limited to his connection to the vessel (or identifiable group of vessels belonging to his employer) to which he is assigned when the injury occurs. Under this rule, the District Court below correctly concluded that Papai—who was working on a one-day maintenance painting job while the Tug was tied to the dock—did not have a sufficient connection to the Tug to be considered a seaman.

ARGUMENT

I. THE FORMAL AWARD OF LHWCA COMPENSATION BENEFITS SHOULD PRECLUDE FURTHER CLAIM TO SEAMAN REMEDIES.

Congress has clearly stated its intention that LHWCA worker remedies and seaman remedies be mutually exclusive. This Court has recognized that principle. Where, as in this case, a final determination has been made that a worker is an employee covered by the LHWCA, that

finding should be given preclusive effect as to subsequent claims to seaman remedies. The plain text of the LHWCA, its legislative history, and the policy underlying the statute all confirm that a formal award of LHWCA benefits precludes further seaman remedies.

A. Seaman Remedies And LHWCA Remedies Are Mutually Exclusive.

1. *Seaman Remedies (The Jones Act).*

The Jones Act, passed in 1920, provides a cause of action in negligence to any "seaman" injured in the course of his employment. 46 U.S.C. § 688(a). Under the general maritime law before 1920, an injured seaman could seek damages from the shipowner only if the vessel's unseaworthiness caused the injuries. An injured seaman also was entitled (regardless of fault for the injury) to "maintenance" (subsistence) and "cure" (medical care) until he recovered. However, the seaman could not sue for negligence. The Jones Act added a negligence cause of action against the employer to the seaman's potential remedies for injury. *Chandris, Inc. v. Latsis,* —— U.S. ——, 115 S.Ct. 2172, 2183, 132 L.Ed. 2d 314, 328, (1995). If an employer is held liable for negligence under the Jones Act or for unseaworthiness under the general maritime law, the injured seaman may recover for past wage loss, future wage loss, medical expenses, and general damages for pain and suffering. 1 Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994), § 6-18, pp. 297-303.

2. *LHWCA Remedies.*

The LHWCA (33 U.S.C. § 901 *et seq.*) was enacted in 1927 to provide a form of workers' compensation in lieu of tort damages for land-based maritime workers, particularly longshoremen, but also others who perform shore-based work in connection with vessels. At the time of its enactment such workers generally were excluded from state workers' compensation coverage. The LHWCA requires an employer to provide wage compensation and medical benefits to an injured LHWCA worker regardless

whether the employer was at fault for the injury, so long as the injury arises out of the worker's employment. In return for compelling the employer to pay the wage compensation and medical benefits regardless of fault, the LHWCA sets a schedule of benefits and grants the employer immunity from tort liability for the injury. 33 U.S.C. § 905(a); 1 Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994), § 7-1, pp. 371-2. The LHWCA covers specified "employees" as defined in the Act, which expressly excludes "a master or member of a crew of any vessel." 33 U.S.C. § 902(3).

Under the LHWCA, a formal award of benefits can be achieved in either of two ways. The first is by way of a formal hearing before an ALJ, akin to a civil trial.[5] The second is by way of a formal settlement between the parties, approved by an ALJ or the district director of the Department of Labor, Office of Workers' Compensation Programs ("OWCP"). The requirements for this kind of formal settlement are set forth in 33 U.S.C. § 908(i), and thus such a resolution is commonly known as a "§ 8(i)" settlement. Under § 908(i), the parties must submit the terms of the settlement to an ALJ or to the district director [6] for approval, to ensure that the settlement is adequate in amount and not procured by duress.[7] Approval of the settlement constitutes an enforceable compensation award, and discharges the employer from further

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[5] This is how Papai obtained his award.

[6] The district director was formerly known as the "deputy commissioner." 20 CFR 782.105.

[7] The elaborate requirements for submitting a settlement for approval are set forth in 20 CFR §§ 702.241-243. The settlement application must contain a description of the incident, the nature of the injury, the medical care rendered, and the compensation paid. § 702.242(a). The application must contain a description of the terms of the settlement, the reasons for the settlement, the issues in dispute, particulars about the claimant, the claimant's work history, the claimant's current medical status, justification about the adequacy of the settlement amount, and the claimant's need for future medical care. § 702.242(b).

liability under the LHWCA for the subjects covered by the settlement. 33 U.S.C. § 908(i).

In addition to the scheduled LHWCA compensation benefits due from the employer, an injured LHWCA worker has the right to sue third parties for negligence causing the injury. 33 U.S.C. § 905(b). Such third parties include the owner and operator of the vessel on which the worker is injured. Under the "dual capacity doctrine," an LHWCA worker can sue the shipowner even if the shipowner also is his employer, but he can sue the dual shipowner/employer only for negligence in its shipowner capacity, not for negligence in its employer capacity. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 529, fn. 6, 103 S.Ct. 2541, 76 L.Ed. 2d 768 (1983); *Reed v. S.S. Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448 (1963).[8]

3. *Seaman Remedies And LHWCA Remedies Are Mutually Exclusive.*

The plain text of the LHWCA demonstrates that when an employer is liable under the LHWCA, that employer may not be held liable under any other remedy scheme, including the Jones Act. LHWCA § 905(a) states:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury . . .

A brief review of the LHWCA's history emphasizes the importance of the legislative policy underlying the exclusivity of the employer's liability. On several occasions since the enactment of the Jones Act in 1920, Congress expressed its strongly-held belief that maritime workers covered by the LHWCA are not entitled to bring a Jones Act negligence action against their employer.

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[8] Thus Papai as an LHWCA worker was able to sue HTB for negligence under § 905(b)—even though HTB was Papai's employer and paid him LHWCA benefits—in HTB's capacity as the operator of the Tug. Following trial of Papai's § 905(b) negligence claim, the court found that HTB was not negligent. (J.A. 81-86.)

As early as 1922, Congress expressed its intent to treat land-based maritime workers differently from seamen. In response to Supreme Court decisions that state workers' compensation laws could not constitutionally apply to land-based maritime workers, Congress passed a law to provide a remedy for those workers separate from the Jones Act, by extending state workers' compensation coverage to them.[9] Although the Supreme Court struck down the law,[10] the importance that Congress placed upon treating land-based maritime workers differently from seamen was clear. The legislative history states:

> There is a clear distinction between the two classes, seamen and landsmen . . . The distinctions are based upon the fact of their employment, upon the separate systems of law which have hitherto been applied to them, and the character of employers . . . .[11]

The legislative history emphasizes that the special remedies available to a seaman are "of great antiquity" and that this "marks him off very clearly from the landsman who works in port." [12]

Two years after declaring unconstitutional the remedial scheme that Congress adopted for land-based maritime workers, the Supreme Court interpreted the term "seaman" in the Jones Act "to include stevedores employed in maritime work on navigable waters." [13] Congress responded to this blurring of the line between seamen and land-based workers by enacting the LHWCA in 1927. The LHWCA was adopted to provide an exclusive compensation remedy for land-based maritime workers, excluding from its coverage "a master or member of a crew

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[9] Act of June 10, 1922, ch. 216, 42 Stat. 634.

[10] *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 646 (1924).

[11] S. Rep. No. 94, 67th Cong., 1st Sess. 2 (1921).

[12] *Id. See also* H.R. Rep. No. 639, 67th Cong., 2d Sess. 4 (1922) ("Congress has always in legislating distinguished between these port workers and seamen.")

[13] *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157 (1926).

of any vessel." [14] As used in the LHWCA, that phrase has been interpreted as having the same meaning as the term "seaman" in the Jones Act.[15] Moreover, in enacting the LHWCA, Congress specifically rejected an amendment to include seamen within the scope of the legislation.[16]

Twenty years later the Supreme Court allowed land-based maritime workers to assert the seaman's claim of unseaworthiness against shipowners.[17] Congress explicitly overturned this decision in 1972.[18] Again, Congress expressed its intent to preserve the distinct special remedies afforded to seamen, while treating land-based maritime workers like other employees under typical workers' compensation systems. The 1972 legislation eliminated the unseaworthiness cause of action for land-based maritime workers. However, Congress allowed LHWCA workers to assert negligence actions against the owners of ships on which they are injured, just as employees covered by a workers' compensation system can sue premises owners or other third parties whose negligence causes a workplace injury. 33 U.S.C. § 905(b).

The legislative history of the 1972 amendments illustrates the strong concern of Congress that the distinction

[14] 33 U.S.C. §§ 902(3)(G).

[15] *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 7-8, 66 S.Ct. 869, 90 L.Ed. 1045 (1946). *See also McDermott Int'l, Inc. v. Wilander*, 448 U.S. 337, 347, 111 S.Ct. 807, 112 L.Ed.2d 111 (1991); *Chandris*, 115 S.Ct. at 2183, 132 L.Ed.2d at 329.

[16] 69 Cong. Rec. 5410 (1927) (statement of Rep. Graham). Congress only considered including seamen within the LHWCA in order to respond to perceived constitutional issues raised by earlier Supreme Court decisions. *Id.* The seamen themselves "bitterly opposed" their inclusion in the bill. 69 Cong. Rec. 5414 (1927) (statement of Rep. Davis). *See also South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256-7, 60 S.Ct. 544, 84 L.Ed. 732 (1940).

[17] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

[18] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (1972).

between seamen and land-based maritime workers be maintained:

> In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

S. Rep. No. 1125, 92d Cong., 2d Sess. 9-10 (1972).

In recent decisions this Court has consistently recognized that the LHWCA and the Jones Act are mutually exclusive compensation regimes, since the Jones Act applies only to a "seaman" and the LHWCA expressly excludes "a master or member of a crew of any vessel," which is synonymous with "seaman." [19]

In summary, Congress has clearly stated its intent that a claimant found to be an "employee" under the LHWCA is entitled only to the remedies provided in that statutory scheme and is not entitled to the remedies accorded to a seaman. The legislative history over more than seventy years demonstrates that this policy is based upon Congress' deeply rooted belief that land-based maritime workers are not subject to the same hazards as are seamen.

B. Until A Claimant's Status Is Determined, The Claimant May Pursue Both LHWCA Remedies And Seaman Remedies Without Having To Make An Election Of Remedies.

The mere receipt of LHWCA benefits, which may be paid voluntarily by an employer in the absence of an ALJ hearing or § 8(i) settlement, does not in itself preclude seaman status. Therefore, a claimant may pursue both

[19] *McDermott Int'l ,Inc.*, 448 U.S. at 347; *Chandris*, 115 S.Ct. at 2183, 132 L.Ed.2d at 329.

potential remedies—LHWCA and seaman (including the Jones Act)—until his status is formally determined.

The Supreme Court recently confirmed this in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 116 L.Ed. 2d 405 (1991). In that case an injured rigging foreman's employer voluntarily paid him LHWCA benefits. Gizoni later sued the employer for negligence under the Jones Act. The Court held in relevant part that the mere receipt of LHWCA benefits paid voluntarily by an employer in the absence of a formal LHWCA award does not in itself preclude seaman status. 502 U.S. at 91.

Gizoni did not address the situation presented here, where the worker's status was litigated in the LHWCA proceeding and a formal award of LHWCA benefits was made. The *Gizoni* decision suggests that the Court would have viewed this situation differently. *Gizoni* stated that an employee who receives voluntary LHWCA payments without a formal award is not barred from subsequently seeking relief under the Jones Act "because the question of coverage has never actually been litigated." 502 U.S. at 91. The implication is that if coverage had been litigated, the employee could not later seek relief under the Jones Act. In the case at bar, the question of coverage was litigated, so the principal rationale for the *Gizoni* decision on this point is absent.

The *Gizoni* decision interpreted the statutory scheme as not intended to force the injured worker to make an initial election of remedies that could preclude any recovery at all. For example, assume that a claimant sought LHWCA benefits, and an ALJ thereafter denied those benefits on the ground that he was a seaman. If the strict rule of election of remedies applied, he would then be unable to pursue a Jones Act remedy because he had previously elected to seek an LHWCA remedy. Obviously this would be unfair. Thus, making a claimant choose between the potential right to an immediate workers' compensation remedy and the Jones Act remedy to which he may be entitled would "force injured maritime workers

to an election of remedies we do not believe Congress to have intended." 502 U.S. at 92, fn. 5.

In the case at bar, however, Papai is not subject to an election of remedies, and the attendant risk of losing all remedies if he initially selected the wrong one. He prevailed in the LHWCA proceeding and has received an award of LHWCA benefits.[20]

C. A Claimant Who Has Been Formally Awarded LHWCA Benefits Should Be Precluded From Thereafter Pursuing Seaman Remedies.

Since the LHWCA and seaman remedy schemes are mutually exclusive, a formal award of LHWCA benefits should be sufficient to effectuate that exclusivity and preclude further seaman remedies. To award LHWCA benefits, an ALJ must find that the claimant is a covered worker, i.e., not a seaman.[21] This finding should be given effect in a subsequent Jones Act action. To do so comports with the Congressional intent expressed in the LHWCA, avoids unjust and inconsistent status determinations, and avoids duplicative judicial proceedings over the same subject matter.

1. *The Preponderant Authority Holds That A Formal Award Of LHWCA Benefits Precludes Further Claim To Seaman Remedies.*

While the Supreme Court has not directly addressed the issue, the preponderant authority in the Courts of Appeals is that a formal award of LHWCA benefits—whether as a result of an ALJ hearing or a § 8(i) settlement—precludes a further claim to seaman remedies. The

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[20] The Court of Appeals opinion below allowed Papai to pursue seaman remedies *even after* a formal award of LHWCA benefits. This was premised upon the notion that its decision was "extending the reasoning of the *Gizoni* court to the next logical step. . . ." 67 F.3d at 208, Pet. App. p. 12a. That premise must be rejected. A step it may be, but given LHWCA § 905(a), it is not a logical one.

[21] The ALJ explicitly so found in this case. *See* the Decision of ALJ Mapes, at Pet. App. 37a ("the claimant cannot be regarded as a member of the crew of any ship or fleet of ships.")

most prominent case on the subject is *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992). In that case the Fifth Circuit held that an ALJ order approving a settlement of LHWCA benefits under § 8(i) precluded subsequent seaman remedies. The *Sharp* court emphasized that while Congress did not intend that a claimant forfeit the right initially to pursue both remedies simultaneously, Congress also did not intend that the claimant be able to pick and choose his ultimate recovery based upon which remedy conferred upon him a larger award. The court noted that the LHWCA was not designed to create a mere safety net, guaranteeing workers a minimum award as they seek greater rewards in court. Rather, the Act is intended to benefit employers, too, giving them limited and predictable liability in exchange for conceding their right to defend the claim on the ground of absence of fault. 973 F.2d at 425-7.

The Fifth Circuit Court of Appeals explained its view of the principles underlying the preclusive effect of an ALJ's determination of a claimant's LHWCA status in *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132-1133 (5th Cir. 1991):

> Permitting a trial court to redetermine issues decided by the administrative system effectively defeats the purpose of the LHWCA. Instead of creating certainty for both employer and employee, permitting a trial court to redetermine the coverage issue reintroduces uncertainty for both. Instead of lowering the cost of recovery for an injured worker, the worker must pay counsel both for representation on the LHWCA claims and again in seeking a jury award. Furthermore, if we permit a trial court and the Department [of Labor] to reach inconsistent determinations of the coverage issue, an injured worker may receive both a jury trial and an LHWCA remedy, or neither, despite the intention of Congress that he receive one or the other. In enacting the LHWCA, Congress intended that it be the sole and exclusive remedy for workers within its scope, not a stepping stone on the way to a jury award. [Footnotes omitted.]
>
> While we recognize that there are differences between the fact-finding processes in the administrative forum and in the judicial forum, we doubt that these differences are sufficient to deprive an injured employee of a fair opportunity to present the coverage issue before the Department. [Footnote omitted.] As a result, a finding of LHWCA coverage sought and obtained by the injured worker from the Department should preclude any subsequent action against his employer for the same injury.

The Court of Appeals for the Second Circuit, too, has held that a formal award of compensation under the LHWCA precludes subsequent recovery of seaman remedies. *Hagens v. United Fruit Co.*, 135 F.2d 842 (2d. Cir. 1943).[22]

2. *A Formal Award Of LHWCA Benefits Should Be Given Preclusive Effect.*

a. ***To Uphold The Provisions And Intent Of The LHWCA, A Formal Award Of LHWCA Benefits Should Per Se Preclude Further Seaman Remedies.***

As related above, the LHWCA by its express terms is the exclusive liability of the employer for an injury under its coverage. 33 U.S.C. § 905(a). The legislative history and court decisions interpreting the LHWCA confirm the mutual exclusivity of LHWCA remedies and seaman remedies. As a matter of law, therefore, the formal award of

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[22] The Court of Appeals for the Ninth Circuit had followed the rule of collateral estoppel on this point. *Figueroa v. Campbell Indus.*, 45 F.3d 311 (9th Cir. 1995). *Cf. Roth v. McAllister Bros., Inc.*, 316 F.2d 143 (2nd Cir. 1963), in which a tugboat operator had prevailed in a New Jersey workers' compensation proceeding on the ground that the claimant was a seaman (and thus excluded from compensation coverage). The court held that the tugboat operator was estopped from arguing in a subsequent Jones Act action that the plaintiff was not a seaman.

LHWCA benefits, whether by an ALJ trial or § 8(i) settlement, should per se preclude further seaman remedies. This conclusion is based upon the statutory interplay of the two remedy schemes.[23]

This conclusion does not depend upon the application of the doctrine of administrative collateral estoppel. While this case could be decided upon the ground that collateral estoppel applies, application of that doctrine is unnecessary, for the plain meaning of § 905(a) and the expressed Congressional intent is that a claimant who is awarded benefits under the LHWCA is precluded from seeking other remedies against his employer.

One of the traditional elements of collateral estoppel is that the issue in question be actually litigated. That often does not occur in an LHWCA proceeding, either because the employer concurs that the claimant is an LHWCA worker, or the parties reach a § 8(i) settlement. The LHWCA was intended to provide a prompt remedy to an injured worker without the expense, uncertainty, and delay that tort actions entail.[24] Requiring actual litigation of the status issue defeats this objective. If the only way that an employer can protect itself from a subsequent Jones Act claim is to litigate the claimant's status in the LHWCA proceeding, the employer will be forced to demand a hearing (rather than enter into a § 8(i) settlement) and take a position—perhaps contrary to its belief —that the claimant is a seaman, in order to ensure that

[23] Although not directly at issue in this case, HTB accepts all the corollaries of the principle of mutual exclusivity: a) If the ALJ denies LHWCA coverage to the claimant because he is a seaman, the employer should be precluded from contesting the claimant's seaman status in a subsequent Jones Act claim. b) If the trier of fact in a Jones Act action grants an award to the claimant, the claimant should be precluded from thereafter seeking further LHWCA remedies. c) If the trier of fact in a Jones Act action denies recovery for the reason that the claimant is not a seaman, the employer should be barred from asserting as a defense in a subsequent LHWCA proceeding that the claimant is a seaman.

[24] *Morrison-Knudsen Const. v. Dir., Office of Wkrs. Comp. Prog.*, 461 U.S. 624, 636, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983).

the ALJ will "actually litigate" the status issue. This injects into the LHWCA proceeding a wholly unnecessary issue.

The disputation will not end there, for it would be an unimaginative claimant's attorney who could not find a way to argue to the court or jury in a subsequent Jones Act suit that the status issue was not "actually litigated" for this purpose. Whether the issue of status was actually litigated in the LHWCA proceeding would be a question of fact in the subsequent Jones Act action. Evidence would have to be presented on this issue, which could become a mini-trial on its own. Until the applicability of collateral estoppel in .he second proceeding is determined, the court and the parties will be subject to the full burden of that proceeding.

Thus the better rule is that § 905(a) per se precludes seaman remedies, whether or not the requirements of collateral estoppel are met. The decision in *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992) points the way. There the Court of Appeals held that a formal LHWCA award, even in the absence of actual litigation of the status issue, precludes further seaman remedies because of the statutory text and purpose of the LHWCA not because of collateral estoppel. HTB requests the Court to adopt that rule.

b. *ALJ Awards Under the LHWCA Satisfy The Requirements Of Administrative Collateral Estoppel.*

If the Court holds that LHWCA § 905(a) does not per se preclude a further claim to seaman remedies, then Papai should be precluded from those remedies on the basis of administrative collateral estoppel. The facts of Papai's case meet even the most stringent possible requirements of collateral estoppel: (1) The question of seaman/non-seaman status was presented to the ALJ; (2) The issue was actually litigated in the administrative proceeding; (3) Determination of the issue by the ALJ was necessary because if Papai was a seaman, then he

was not entitled to LHWCA benefits; and (4) the ALJ made an explicit finding of non-seaman status.

The Supreme Court has held that administrative determinations of fact should be binding. The Court recently reiterated this principle in *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S.Ct. 2166, 115 L.Ed. 2d 96 (1991): "We have long favored application of the common-law doctrine of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." 501 U.S. at 107. Pursuant to this principle, a formal award of LHWCA benefits (whether by an ALJ hearing or approval of a § 8(i) settlement) in which LHWCA worker status is expressly found should be given effect to preclude a subsequent claim to seaman remedies.

The *Solimino* decision listed the prerequisites for administrative collateral estoppel: the administrative agency must be acting in a judicial capacity resolving disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate. *Solimino*, 501 U.S. at 107, citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 16 L.Ed. 2d 642 (1966). LHWCA awards satisfy these requirements.

(1) *No Statutory Intent Precludes The Application Of Administrative Collateral Estoppel In This Case.*

The *Solimino* case stated an exception to the imposition of administrative collateral estoppel. The Court noted that Congress legislates against a background of common-law adjudication principles, including collateral estoppel. Thus courts may take it as given that Congress has legislated with an expectation that the principle will apply unless a contrary statutory purpose is clearly evident.[25]

[25] *Solimino*, 502 U.S. 104, 108. In *Solimino*, the Court found that the statute at issue in that case contained provisions that "make clear that collateral estoppel is not to apply." 502 U.S. at 110-11.

The LHWCA contains no evident statutory purpose to overcome the presumed application of administrative collateral estoppel. Neither the statutory text, nor the legislative history, nor the policies underlying the LHWCA reveal any such intent. Indeed, these sources strongly confirm that Congress intended for the LHWCA and the Jones Act to be mutually exclusive, even where all the formal elements of collateral estoppel are not met.

The text of the statute alone suffices on this point. Section 905(a) provides that the liability of an employer under the LHWCA "shall be exclusive and in place of all other liability of such employer to the employee." The plain meaning of this provision is that if a worker is found to be covered by the LHWCA, the employer is not to be subject to any other remedies, including the Jones Act.

The only implication in the Act that collateral estoppel arguably may not apply is in § 903(e), which allows a credit to the employer against its liability under the LHWCA for amounts paid to the claimant pursuant to any other workers' compensation law or the Jones Act. Section 903(e) was added to the LHWCA in 1984 as part of a package of amendments. Longshore and Harbor Workers Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (1984). The main purpose of section 903(e) was to address the interplay of the LHWCA with state workers' compensation schemes. *See* H.R. Rep. No. 98-570, 98th Cong., 1st Sess., pt. 1, at 26 (1983). The legislative history is silent about why the Jones Act was included.[26] By its own terms, § 903(e) provides an offset only when a claimant seeks an LHWCA recovery after receiving a payment under the Jones Act; it does not cover the situation presented in the present case, where a Jones Act recovery is sought after payment

[26] *See* H.R. Rep. No. 570, 98th Cong., 1st Sess., pt. 1 (1983) and H.R. Conf. Rep. No. 1027, 98th Cong., 2nd Sess (1984), *reprinted in* 1984 U.S.C.C.A.N. 2734, *et seq. See also* S. Rep. No. 81, 98th Cong., 1st Sess. (1983).

is made under the LHWCA. To argue that § 903(e) evidences a Congressional intent to overcome the collateral estoppel effect of an LHWCA award requires a chain of inference too weak to lift the firm anchor provided by the plain text of LHWCA § 905(a).[27]

In summary, the statutory text of the LHWCA not only is devoid of intent to overcome the presumption of collateral estoppel, it is strongly supportive of that presumption. The legislative history of the statute also supports the conclusion that workers receiving a formal LHWCA award should be precluded from seaman remedies. Congress has repeatedly stated that LHWCA remedies are exclusive, not a stepping stone to a Jones Act jury trial.

The Court of Appeals decision in this case may have been influenced by the general objective of the LHWCA to assist injured workers. The Supreme Court, however, has warned against interpreting the statutory scheme based upon a court's understanding of the general statutory policy:

> No legislation pursues its purposes at all costs. Deciding whether competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-6, 107 S. Ct. 3191, 94 L.Ed. 2d 533 (1987) (per curiam) (emphasis in original).[28] The broad objective of the LHWCA should not be read to overcome the text of § 905(a) and that section's legislative history, particularly when the issue is whether Congress intended to overcome a common-law presumption.[29]

[27] If a payment is made in settlement of a Jones Act claim without a finding of seaman status, then the claimant would still be entitled to pursue an LHWCA remedy and the offset provided in § 903(e) would apply. Applying § 903(e) to that situation would give that section effect, while maintaining consistency with the principle of mutual exclusivity of the remedies.

[28] *See also Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74, 106 S. Ct. 681, 88 L.Ed. 2d 691 (1986): "Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action . . . Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."

[29] For instance, assuming that Congress' broad objective was to protect injured employees, this policy could lead to different conclusions about whether to overcome the presumption of administrative collateral estoppel. Inconsistent coverage determinations could result in a worker having no remedy at all, if both tribunals (LHWCA and court) rule against the claimant on status. Thus, this general statutory purpose does not support the conclusion that Congress intended to overcome the presumption of administrative collateral estoppel.

[30] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (1972), Section 15, codified at 33 U.S.C. § 921(b). *See* H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, *et seq.* The present LHWCA appeal process is set forth in 33 U.S.C. § 921.

(2) *The Bassett Case Does Not Address Collateral Estoppel.*

The process of appealing an LHWCA decision underwent a significant change in 1972. Before that year review of Department of Labor LHWCA decisions was by way of injunction proceedings in the district courts. The 1972 Amendments to the LHWCA created the Benefits Review Board, which thereafter was to hear appeals of ALJ and District Director decisions.[30]

It was under this pre-1972 appeal process that the Supreme Court decided *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732 (1940). In that case a laborer fell from a vessel that was supplying coal to another vessel. The worker drowned. The deputy commissioner of the Department of Labor awarded his widow benefits under the LHWCA. The employer sued in federal court to restrain the enforcement

of the LHWCA award, contending that the decedent was a seaman, and hence not covered by the LHWCA. The District Court considered the status question de novo and found that the decedent was a seaman. The Supreme Court held that the District Court erred in assessing the issue anew. The Court noted that seaman status turns on questions of fact, and that Congress in the LHWCA has confided such questions to the Department of Labor. Hence the deputy commissioner's finding of status was conclusive if there was evidence to support it. 309 U.S. at 257.[31]

Bassett addresses the standard of review of a Department of Labor decision under the LHWCA, not whether collateral estoppel should apply to a final decision. *Bassett* does not provide authority for avoiding the application of collateral estoppel through review by the courts of final Department of Labor LHWCA decisions.[32]

In this case, the ALJ determined that Papai was an LHWCA worker and not a seaman. The ALJ's decision was not appealed, and therefore it is final. The issue now is not whether the ALJ was correct in that decision. That is an issue of preclusion or collateral estoppel, not the sufficiency of the evidence before the ALJ.

c. *Allowing Two Proceedings About The Same Injury Will Result In Inconsistencies And Excessive Litigation.*

If an award of LHWCA benefits is not given preclusive effect, then the claimant will be able to re-litigate his

[31] In its *McDermott Int'l, Inc. v. Wilander* decision, the Court confirmed this part of the *Bassett* decision, stating: "If there is evidence to support the deputy commissioner's finding, it is conclusive." 498 U.S. at 356. However, the Court jettisoned *Bassett*'s arguable "aid in navigation" requirement for seaman status. 498 U.S. at 353.

[32] To the extent that *Bassett* is read to allow an exception to the imposition of administrative collateral estoppel if no evidence supports the administrative decision, that exception does not apply in this case. Indeed the contrary is the case here—the relevant evidence overwhelmingly supports the finding that Papai was a land-based worker covered by the LHWCA, not a seaman.

case in a subsequent Jones Act lawsuit. This will result in inconsistencies and excessive litigation.

Allowing inconsistent coverage determinations could result in a worker having no remedy at all. As noted by the Fifth Circuit Court of Appeals in *Fontenot*, allowing inconsistent coverage determinations could result in an LHWCA forum determination that a worker was a seaman (hence denying recovery) and a Jones Act forum determination that the worker was not a seaman (hence denying recovery). *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1133, fn.39 (5th Cir. 1991). This surely would be an unjust result.[33]

The legislative history of the LHWCA reflects Congressional concern about excessive litigation.[34] Allowing both LHWCA and Jones Act proceedings will excessively consume the time and resources of the courts, the ALJs, and the parties. The increase in attorney fees is patent. This does not affect employers only; while employers must pay the attorney fees for a successful claimant under the LHWCA, the claimant must bear some or all of the fee if his claim is unsuccessful. 33 U.S.C. § 928. Also, the LHWCA was intended to provide a benefit to employers, "giving them limited and predictable liability in exchange for their giving up their ability to defend tort actions." *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 426-7 (5th Cir. 1992). These mutual benefits lie at the heart of the LHWCA. If claimants found to be LHWCA workers can subject their employers to lengthy, expensive Jones Act litigation, a basic underpinning of the LHWCA will be effectively abolished.[35]

[33] Similarly, one jury may limit a claimant to an LHWCA remedy, while another jury may allow his co-worker (performing identical job duties) a Jones Act remedy too.

[34] *See* 118 Cong. Rec. 36388 (1972) (statement of Rep. Mink); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 5 (1972) ("The Committee heard testimony that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs.")

[35] The Court of Appeals below was concerned that imposing preclusion on the status issue would be a disincentive on the employer's

Therefore a formal award of LHWCA benefits—whether following an ALJ hearing or a § 8(i) settlement—should preclude further seaman remedies. Such a rule would be clear, consistent, and easy to administer, would conserve the resources of the courts, the Department of Labor, and the parties, and would be in conformity with the principle of mutual exclusivity.

d. ***Allowing A Credit Against The Second Recovery Does Not Cure The Deficiencies Of Allowing The Claimant To Pursue Both Remedies Schemes To Conclusion.***

One reason why the Court of Appeals in this case allowed Papai to seek seaman remedies in addition to his LHWCA benefits was the belief that no harm would be done: since HTB would receive a "credit" on the Jones Act award for what HTB had paid in LHWCA benefits, HTB would not have to pay twice, and Papai would not receive a double recovery. (67 F.3d at 207, Pet. App. pp. 10a-11a.) However the credit that an employer receives in a Jones Act case is not necessarily equal to what the employer has paid in LHWCA benefits. Nor is the credit that the employer receives in an LHWCA proceeding equal to what he has paid in a Jones Act case. The use of credits is not a cure for allowing concurrent remedy schemes.

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part to vigorously litigate its defense in the LHWCA action in order to bar the claimant from a subsequent Jones Act action. 67 F.3d at 207, Pet. App. p. 11a. This makes two false assumptions: (1) that a Jones Act claim is always worth more than an LHWCA remedy (the latter is more certain since not dependent upon employer fault), and (2) that the employer controls the order of proceedings (the claimant can drop or stay his LHWCA claim and test the Jones Act waters in court first). The Court of Appeals also was concerned that imposing a ban would result in subjecting to suit an employer who immediately and voluntarily begins compensation payments while immunizing from suit an employer who forces his employee to seek compensation through litigation. *Id.* The Court of Appeals has identified the wrong solution. This can be cured by giving preclusive effect to a § 8(i) settlement, since the employer can then make LHWCA payments without being subject to a Jones Act suit.

(1) ***The Employer's Credit In A Jones Act Case For Prior Payment Of LHWCA Benefits.***

Courts have rarely addressed the credit an employer is to receive when he is found liable in a Jones Act case but has already paid LHWCA benefits. The main authority on the issue is *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679-80 (5th Cir. 1969). That case allowed the credit to be applied only against Jones Act damages items that are comparable to the loss items compensated by the LHWCA benefits, namely the claimant's lost past wages, medical payments, and maintenance, but not against the claimant's Jones Act award for pain and suffering or for loss of earning capacity subsequent to the date of payment of the last compensation benefit (*i.e.*, loss of future earnings).

Thus if the claimant recovers a lower past wage loss award under the Jones Act than he received under the LHWCA,[36] but also recovers a pain and suffering award, the claimant will end up receiving a higher recovery (LHWCA wage loss benefits plus Jones Act pain and suffering) than either statutory scheme separately allowed. Exacerbating matters from the employer's point of view is that under the LHWCA the employer must pay a successful claimant's attorney fee (33 U.S.C. § 928), against which no credit is given in the Jones Act case, no matter the outcome.

(2) ***The Employer's Credit In An LHWCA Proceeding For Prior Payment Of A Jones Act Award.***

LHWCA § 903(e) specifies that a credit is to be given to an employer for payment of a prior Jones Act award. When an LHWCA worker recovers tort damages from a negligent third party under § 905(b), the LHWCA gives a credit to the employer for the claimant's *net* recovery

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[36] This could occur for several reasons, one of which is that the claimant's recovery in a Jones Act case, but not under the LHWCA, is reduced by his comparative fault.

from the third party, meaning the recovery less all attorney fees and expenses. 33 U.S.C. § 933(f). The only authority on the subject is that although § 903(e) provides for a credit of "all amounts paid," the credit should —as in § 933(f)—include only the net amount (after deduction of attorney fees) that the claimant has received. *Bundens v. J.E. Brennerman Co.*, 46 F.3d 292, 304, fn. 24 (3d Cir. 1995).

Therefore the employer must pay the full Jones Act award but—assuming a 33% contingency fee to the claimant's attorney—receives a credit for only two-thirds of it. Another way that the litigation-weary employer may view the situation is that he has had to pay four sets of attorney fees: the claimant's attorney fee for the Jones Act case (because the employer paid it but did not get a credit for it), the claimant's attorney fee in the LHWCA case (per 33 U.S.C. § 928), and the employer's own attorney fees in both cases.

D. Having Received A Formal Award Of LHWCA Benefits, Papai Should Be Precluded From Further Pursuing Seaman Remedies.

The ALJ—after formal hearing—determined that Papai was an LHWCA worker and not a seaman and granted him a formal award of benefits. The issue now is not whether the ALJ was correct in that decision. The ALJ's decision was not appealed, and therefore it is final. The issue now is the effect of that final ALJ decision, namely whether it precludes Papai from seeking seaman remedies thereafter.

Papai should be precluded from seeking further seaman remedies. The mutual exclusivity of the two remedy schemes resulting from the text of 33 U.S.C. § 905(a) mandates this result. Also, this case meets all the requirements of administrative collateral estoppel since the ALJ was acting in a judicial capacity and resolved a disputed issue of fact (Papai's status) properly before it that the parties actually litigated. Therefore the Court of Appeals decision below should be reversed, and the District Court's

ruling that Papai was not a seaman should be reinstated, on the ground that Papai is now precluded from seeking seaman status.

II. A CLAIMANT'S STATUS AS A SEAMAN SHOULD BE BASED UPON HIS CONNECTION TO THE VESSEL TO WHICH HE IS ASSIGNED WHEN INJURED OR, IN CERTAIN CIRCUMSTANCES, AN IDENTIFIABLE GROUP OF VESSELS BELONGING TO HIS EMPLOYER.

A. To Be Considered A Seaman, The Claimant Must Have A Connection To A Vessel Or Identifiable Group Of Vessels That Is Substantial In Both Duration And Nature.

In *Chandris, Inc. v. Latsis*, —— U.S. ——, 115 S.Ct. 2172, 132 L.Ed. 2d 314 (1995), the Supreme Court noted that since its decision in *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946), the law has been clear that remedies under either the Jones Act or the general maritime law are available only to seamen, not to land-based maritime workers. *Chandris*, 115 S.Ct. at 2185, 132 L.Ed. 2d at 331. In *Chandris* the Court described the somewhat erratic course that the precedents have steered in trying to differentiate seamen from land-based maritime workers. A particularly vexing issue has been what employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman. One fundamental principle underlying this issue is that a claimant's status does not depend upon the place where the injury occurs but upon the nature of the claimant's work and his relationship to the vessel. *Id.*, 115 S.Ct. at 2186, 132 L.Ed. 2d at 332. Thus seamen may recover under the Jones Act or the general maritime law whether they are injured on or off the ship, and land-based workers injured on a vessel in navigation remain covered by the LHWCA, not by seaman remedies. *Id.* "It is therefore well settled after decades of judicial interpretation that the Jones Act inquiry is fundamentally status-based: land-based maritime workers do not become seamen because

they happen to be working on board a vessel when they are injured . . ." *Id.*

Thus the prerequisite for seaman remedies is seaman status, and seaman status in turn is dependent upon the nature of the claimant's work and his relationship to the vessel. In *Chandris* the Court set forth the required connection to a vessel for the claimant to have seaman status:

> . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

115 S.Ct. at 2190, 132 L.Ed. 2d at 337.

The Court of Appeals decision in this case calls into question whether this standard applies to the vessel to which the claimant is currently assigned or to all vessels on which the claimant has worked.

B. Normally Seaman Status Is Based Upon The Claimant's Relationship To The Vessel To Which He Is Assigned When The Injury Occurs. However Under Certain Circumstances The Fleet Seaman Doctrine Allows Consideration Of The Claimant's Relationship To An Identifiable Group Of Vessels Belonging To The Claimant's Employer.

Chandris requires (as had prior law) that to be a seaman a claimant must have a connection to a vessel in navigation that is substantial in duration and nature. Normally, the court considers the claimant's relationship only to the specific vessel to which he is assigned when injured. However, an exception has developed to this rule. The seminal case for this exception is *Braniff v.*

Jackson Ave.—Gretna Ferry, Inc., 280 F.2d 523 (5th Cir. 1960). In that case Braniff was a full-time employee of a ferry company, in charge of the maintenance and repair of a number of ferry boats. He boarded each of the ferries every day. He would spend varying amounts of time on them while they were operating, depending upon their maintenance and repair needs. He was not, however, assigned to any particular ferry. The Fifth Circuit Court of Appeals recognized that "[t]he usual thing, of course, is for a person to have a Jones Act seaman status in relation to a particular vessel." 280 F.2d at 528. The court ruled that a claimant nevertheless could be a seaman if—assuming all other seaman status requirements were met—the claimant's work was on several specified vessels instead of just the one on which he was injured. *Id.*

A line of cases developed thereafter in the Fifth Circuit refining this exception, which became known as the "Fleet Seaman Doctrine." [37] In general, the Doctrine has been applied only where the courts have considered it inappropriate to exclude from seaman status a maritime worker who regularly performs seaman's work for a specific employer on a number of different vessels, to none of which the worker has a "permanent" or even "substantial" connection. Courts have considered it unfair to exclude from seaman status a worker who in all respects would be considered a seaman except that his employer frequently moves him from vessel to vessel.

The Doctrine has a limitation: the claimant must have a permanent or substantial connection to a fleet of vessels *under common ownership or control.*

> By fleet we mean an identifiable group of vessels acting together or under one control. [Footnote omit-

[37] The line of cases is described in Morrison, "The Fifth Circuit's Identifiable Fleet Requirement For Seaman Status Under the Jones Act," 31 Willamette L. Rev. 53 (1995); *see also* Robertson, "The Law of Seaman Status Clarified," 23 J. Mar. L. & Com. 1, 16-22 (1992).

> ted.] We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated.

Barrett v. Chevron. U.S.A. Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (*en banc*). *Accord, Bach v. Trident S.S. Co.*, 920 F.2d 322, 324-326 (5th Cir. 1991), *vacated and remanded*, 500 U.S. 949, 111 S.Ct. 2253, 114 L.Ed. 2d 706, *reinstated on remand*, 9 47 F.2d 1290 (5th Cir. 1991). In *Bach* the court stated: "Dozens (perhaps hundreds) of seaman status cases have come before us, but we have never made an exception to the core requirement that the injured worker show attachment to a vessel or identifiable fleet of vessels." 920 F.2d at 326. In *Campo v. Electro-Coal Transfer Corp.* 970 F.2d 51, 52 (5th Cir. 1992), reinstating on different grounds *Campo v. Electro-Coal Transfer Corp.*, 955 F.2d 10 (5th Cir. 1990), the Court of Appeals affirmed the District Court's directed verdict that Campo, who was injured on a barge while unrolling its cargo cover, was not a seaman. He spent most of his time dockside operating an unloading machine, but spent about 40% of his time aboard various vessels performing typical deckhand functions to facilitate cargo operations. He worked for short periods aboard a large number of vessels doing this work. In denying Campo's contention that his seaman status should be considered in regard to his work on the "fleet" of vessels on which he worked, the Court of Appeals noted that Campo did not establish common control of the three groups of vessels that he contended were a fleet, and that he was randomly assigned to vessels without regard to ownership or control of the vessels. The court stated: "It is well established that a large number of variously owned and controlled vessels does not constitute a fleet." 970 F.2d at 53.

In *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247 (3d Cir. 1994), the Third Circuit Court of Appeals extensively and cogently discussed the history, purpose, and requirements of the Fleet Seaman Doctrine. Reeves was a maritime worker injured aboard the dredge BECKY BETH while it was working on a non-navigable lake. Because Jones Act coverage requires that the claimant's work be connected to a vessel on navigable waters, Reeves could not be considered a seaman if his status was determined by reference only to his work on the BECKY SMITH. In his employment before his work on that dredge, however, Reeves had a long history as a dredge welder with a different employer, during which he clearly was a seaman. His work on the BECKY SMITH was a short-term assignment through his maritime union while he was temporarily laid off by his prior employer, to which he had the right to return when work became available again. Reeves contended that his overall employment history qualified him for seaman status, relying upon the Fleet Seaman Doctrine. The District Court granted summary judgment that Reeves was not a seaman, and the Court of Appeals affirmed.[38]

The Court of Appeals in *Reeves* analyzed the Fleet Seaman Doctrine in detail, reciting its development in the Fifth Circuit, and finding it to be consistent with Supreme Court authority. The *Reeves* opinion summarized the Doctrine as follows:

> As we stated above, traditionally a seaman's status is tied to a particular vessel, resulting in an employee losing his seaman status if he is assigned to a non-navigable vessel, even if within the employer's fleet. The Fleet Seaman Doctrine in our view applies to an employee, one who is predominantly assigned by his employer to a navigable vessel, but who occa-

[38] Reeves had a "substantial connection" to the BECKY BETH, unlike Papai's relationship to the Tug in this case. The cases are analogous, however, on the point whether a worker who—when injured during a work assignment in which he is not a seaman—can nevertheless be granted seaman status because of prior work assignments.

> sionally is assigned *by that same employer* to non-navigable vessels. It would also apply to one who is assigned to a number of navigable vessels and spends some time on shore, as in *Brantiff*. The doctrine protects the employee from losing his status as a seaman when on temporary non-navigable assignments or when assignments to a number of vessels preclude attachment to one.

26 F.3d at 1256. [Emphasis in original.]

The *Reeves* opinion was careful to point out that the "fleet" to be considered is that of the claimant's employer when the claimant is injured.

> The key to the Fleet Seaman Doctrine is that the seaman maintain the employment relationship with the same employer. The term "fleet" refers to the fleet of vessels owned by the employer, not the fleet of vessels on which the employee has worked.

26 F.3d at 1256.

* * * *

> We agree with the en banc opinion in *Barrett*, that a fleet is an identifiable group of vessels acting together or under one control . . . The case law uniformly rejects the claim that "fleet" means any group of vessels an employee happens to work aboard. At a minimum, the ships must take their direction from one identifiable central authority to constitute a fleet.

26 F.3d at 1257-8.

The Supreme Court has not directly addressed the Fleet Seaman Doctrine. In *Chandris*, however, this Court favorably cited the Fifth Circuit formulation of the Doctrine (115 S.Ct. at 2189, 132 L.Ed. 2d at 336-7), and adopted its standard formulation by requiring that a claimant's status be determined by his connection to a vessel or an "identifiable group of such vessels." (115 S.Ct. at 2190, 132 L.Ed. 2d at 337.)

C. The Decision Of The Court Of Appeals Erroneously Allows A Claimant's Seaman Status To Be Determined By His Work History On All Vessels Of All His Employers.

The majority opinion below (Judge Poole dissenting) allows a claimant's status as a seaman to be determined by his work history on all vessels of all his employers. The opinion states that the standard to be used in determining seaman status shall be:

> In short, all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, as well as work performed for other employers during the relevant time should be considered in making the determination.

67 F.3d at 206, Pet. App. p. 8a.

The opinion does not define or explain the critical term "relevant time." The trier of fact presumably could consider the "relevant time" to be the claimant's entire working career.

This radical departure from precedent is based upon a misreading of the following sentence of dictum in *Chandris:* "[W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer. . . ." 67 F.3d at 206, Pet. App. p. 7a, quoting *Chandris*, 115 S.Ct. at 2191, 132 L.Ed. 2d at 339. The Court of Appeals opinion seized upon the words "particular employer" and read that sentence to remove the limitation that status is based upon the claimant's work for his employer at the time of the injury. However, that portion of the *Chandris* opinion was addressing the need in some cases to judge the claimant's connection to a vessel or fleet of vessels not on the overall course of the claimant's work history with his employer, but only on the claimant's current assignment with that employer. For instance, the Supreme Court posited, someone who worked for years in a company's shoreside headquarters but who is then reassigned to its ship in a classic seaman's job and is

promptly injured is a seaman. Conversely, someone who is transferred to a desk job in the company's office and is injured in the hallway is not entitled to seaman status on the basi of prior service at sea. 115 S.Ct. at 2191, 132 L.Ed. 2d at 339-40.

It was in that context that the Supreme Court stated that it sees "no reason to limit the seaman status inquiry exclusively to an examination of the overall course of a worker's service with a particular employer." The key words in this sentence are "overall course," not "particular employer." This sentence narrowed the seaman status inquiry to the claimant's current assignment with a specific employer at the time of his injury. The Court of Appeals opinion turned the sentence upside down and interpreted it as an instruction to greatly expand the seaman status inquiry by allowing consideration of the claimant's work history with all his employers.[39]

The seaman status test in the Court of Appeals decision below also departs from precedent in extending the scope of the status inquiry to work performed *after* the accident. Its formulation of the seaman status test allows the trier of fact to consider all the work performed by the claimant before "and after, if any" the accident. (67 F.3d at 206, Pet. App. p. 8a.) Future or potential future employment at sea, however, should not change a claimant's status at the time of his injury. This would allow post-injury seagoing employment retroactively to turn a land-based worker into a seaman.

In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed 205 (1952), Desper was killed

[39] The Fifth Circuit Court of Appeals has recognized that seaman status (including the application of the Fleet Seaman Doctrine) should be analyzed relative to the claimant's current work assignment. *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1075-6 (5th Cir. 1986). ("If the plaintiff receives a new work assignment before his accident in which either his essential duties or his work location is permanently changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new job.")

while painting life preservers for use on a sight-seeing boat that was laid up on shore for the winter. The boat operated during the summer months. Desper had been a seaman on the boat the previous summer, and he was engaged to work as a seaman the following summer as well. Because he did not meet the seaman status test at the time of the accident, however, the Supreme Court found that he could not sue his employer under the Jones Act. The Court stated: "To be sure, he [Desper] was a probable navigator in the near future, but the law does not cover probable or expectant seaman but seamen in being." 342 U.S. at 190-1. To the same effect see *Heise v. Fishing Co. of Alaska*, 79 F.3d 903 (9th Cir. 1996) (injured land-based maintenance and repair worker not a seaman even though he expected to sail with the vessel when it returned to sea).

D. The Court Should Verify That Seaman Status Must Be Based Upon the Claimant's Work Assignment When Injured.

One of the few certain elements of the seaman status test over the years has been that the claimant's status is to be determined relative to the vessel to which he was assigned when injured. In narrow circumstances, the Fleet Seaman Doctrine extended the analysis to include a permanent employee's work on all his employer's vessels, when he was regularly assigned to work on those vessels, but was not assigned to work on any particular one of them. The Court of Appeals opinion now puts into play the claimant's work history for all employers during the (undefined and uncircumscribed) "relevant time." This approach makes seaman status essentially discretionary for the jury, and consequently unpredictable. Such an open-ended standard contradicts the proper rule illustrated by the Supreme Court's hypothetical examples in *Chandris*. There the Court postulated a situation in which a claimant had worked for years in an employer's shoreside office and was then reassigned to a ship in a classic seaman's job, and stated that such a person should not be denied seaman status if injured shortly after the reassignment. The stand-

ard that the Court of Appeals espoused below would allow a jury to decide that such a claimant was not a seaman. Indeed, if the claimant had worked *only* in a classic seaman's job with the employer, that standard would allow a jury to find that he was not a seaman at the time of injury because for several years previously he had worked shoreside for *other* employers. Similarly, the Court in *Chandris* postulated a situation in which a maritime worker is transferred to a desk job in the company's office and is injured in the hallway, stating that he should not be able to claim seaman status on the basis of prior service at sea. The Court of Appeals standard would allow the jury to decide that such a worker was a seaman.

In *Chandris* the Court noted the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act and the LHWCA "before a particular work day begins." 115 S.Ct. at 2187, 132 L.Ed. 2d at 334. While an employer can be expected to know a worker's history with his company, the employer cannot be expected to know that worker's history in other jobs with other employers.[40] Thus predictability of the worker's status will be impossible.

The Court of Appeals opinion certainly will generate more litigation, since workers who otherwise are clearly not seamen based upon their work assignment when injured now will be able to seek a jury determination that prior or subsequent work assignments should control the status issue. Similarly, employers may challenge the status of workers who clearly are seamen when injured, by invoking prior or subsequent shoreside work. Even the best-intentioned jury will have difficulty determining the "relevant time" to consider. This Court should adopt the Third Circuit and Fifth Circuit formulation of the Fleet Seaman Doctrine, which constitutes a bright line rule that saves the time of the courts and the resources of the parties.

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[40] Many maritime workers, like Papai in this case, are sent out from union hiring halls.

Using the language of *Desper*, HTB submits that—by precedent and logic—seaman status should be accorded to seamen in being, not to former or expectant seamen. As the court stated in *Reeves v. Mobile Dredging & Pumping Co., Inc.*: "Because the Jones Act protects only seamen, the claimant must be a seaman at the time of the injury—the fact that he was once a seaman and that he or his employer intends for him to become a seaman once again will not suffice to cloak with seaman status the employee who has stepped out of seaman status, regardless of how near or remote in time or place. . . ." 26 F.3d at 1257, fn.13.

E. The District Court Correctly Determined That Papai Did Not Have A Sufficiently Substantial Connection To The Tug To Be A Seaman.

Papai was aboard the Tug for a one-day (8 hour) maintenance painting job. The Tug was tied to the dock throughout the day and unmanned by operational crew. He commuted from home to the jobsite, and he went back home from the jobsite. Under the rule of *Chandris v. Latsis*, this was not a sufficient connection with the Tug for Papai to be a seaman. Indeed, he was exactly the type of land-based maritime worker that the *Chandris* case excluded from seaman status.[41]

The Fleet Seaman Doctrine does not apply to Papai. That Doctrine concerns a maritime worker who is regularly employed on vessels of a single employer, but who has no substantial connection to any particular vessel of that employer. Papai was not a regular employee of HTB; he worked for several employers. Papai's jobs with HTB were transitory one or two day jobs that Papai obtained through the IBU hiring hall from time to time.

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[41] In the District Court Papai argued that he should be considered a seaman because his job title was "deckhand." The Supreme Court rejected an identical argument in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 260, 60 S.Ct. 544, 84 L.Ed. 732 (1940). There the Court stated that crewmember status depends upon the claimant's actual duties, not his job title as deckhand.

Each of his jobs for HTB was self-contained, not continuous. His work for HTB was sporadic and happenstance. Under such circumstances, the Fleet Seaman Doctrine does not apply to Papai for his injury on the Tug. The Supreme Court ruled in *Chandris* that if a maritime worker receives a new work assignment in which his essential duties are changed, the substantiality of his vessel-related work should be made on the basis of his activities in his new position. 132 L.Ed. 2d at 340, 115 S.Ct. at 2191-2. Each of Papai's jobs were discrete work assignments, as was his one-day maintenance painting job when he was injured. His connection to the Tug should be considered in view of that one-day work assignment only.

Even if Papai's overall work history with HTB is considered, he did not have a sufficiently substantial connection to HTB's vessels for seaman status. From January 1, 1989 until the accident on March 13, 1989, Papai had worked a total of 13 days for HTB on various vessels. His work was day to day, and he lived, ate, and slept at home. In the words of *Chandris*, he was one of "those land-based workers who have a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." 132 L.Ed. 2d at 337, 115 S.Ct. at 2190.

While seaman status is a mixed question of law and fact, it may be determined by summary judgment in appropriate circumstances. In *McDermott Int'l v. Wilander*, the Court stated: "If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury. . . . Nonetheless, summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." 498 U.S. at 356.

The District Court correctly granted summary judgment on the seaman status issue. The facts do not admit

of reasonable dispute—Papai was a land-based worker at the time of his injury. The Court of Appeals decision below should be reversed, and the District Court's ruling that Papai was not a seaman should be reinstated.

CONCLUSION

HTB submits that this Court should rule that a formal award of LHWCA benefits—whether from an ALJ decision or a § 8(i) settlement—should preclude the recipient from thereafter obtaining seaman remedies. Such a rule not only comports with the text and purpose of the LHWCA, it is fair, clear, and easy to administer. It will prevent unnecessary, duplicative litigation of the status issue. Under this rule, the Court of Appeals decision should be reversed, and Papai should be precluded from further pursuing seaman remedies.

HTB also submits that this Court should confirm that status as a seaman should be based upon a claimant's connection to the vessel to which he is assigned when the injury occurs. The only exception should be when a claimant is a steady employee who regularly performs seaman's work for a specific employer on multiple vessels belonging to that employer. Then consideration should be given to the claimant's connection to those several vessels. This rule would comport with the accepted view of seaman status and present a clear guidepost to the trier of fact. Under either the proposed general rule or the exception, the Court of Appeals decision should be reversed, and the District Court's ruling that Papai was not a seaman should be reinstated.

Definition of seaman status has been a judicial nemesis; the frequent litigation and confusing results in status cases bear witness. The Supreme Court decisions in *McDermott*, *Gizoni*, and *Chandris* have helped to clear the fog. This case presents the opportunity to place clear channel markers on two more criteria for seaman status.

Respectfully submitted,

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November 12, 1996

(8)

No. 95-1621

IN THE

Supreme Court of the United States
OCTOBER TERM, 1995

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1). Is there any factor that would deprive Respondent of seaman status under the Jones Act while working on a vessel in navigation pursuant to Petitioner's Deckhands Agreement

2). Does Respondent's receipt of compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) preclude him from also recovering as a seaman under the Jones Act.

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RESPONDENT'S BRIEF

COUNTER STATEMENT OF THE CASE

A. FACTS

This case arises from a knee injury sustained by Respondent John Papai while in the course and scope of his employment for Petitioner Harbor Tug and Barge Company (HTB) on board the tug *Point Barrow*. (Pet. App. 2a).

Papai worked at various maritime related jobs for various companies and obtained his maritime jobs through the hiring hall of the Inland Boatman's Union of the Pacific (IBU). He was not a permanent employee of HTB. HTB along with other companies is a party to a Deckhands Agreement with the IBU pursuant to which the vessels obtain their deckhands through the union. Apparently, there was no permanent crew on any of the vessels and assignments were made on a day-to-day basis. (Pet. App. 2a).

Papai had worked for HTB as a deckhand on twelve previous occasions in 1989, and on March 13, 1989, Papai was dispatched by the IBU hiring hall to perform maintenance for one day on HTB's tug *Point Barrow*, under the supervision of HTB's Port Captain.[1] (Pet. App. 2a).

Regardless of the work they might do on a particular day these deckhands were dispatched as crew members under the Deckhands Agreement and paid by Petitioner under the code "008." (Testimony of HTB Senior Port Captain Clinton, vol. 9, pp. 28-29).

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[1]Contrary to what is stated on p. 3 of Petitioner's Brief, this Port Captain was not "shoreside." He was in charge of the seagoing operation of the tug. (Testimony of HTB Senior Port Captain Clinton, vol. 9, p. 37). If he was a "shoreside" employee, his conduct would not be imputable to the vessel.

As it would be on any day when it was not assisting ships, the tug was manned only by the deck hands dispatched to maintain it. The engines were ready to run should the tug be needed to accomplish its mission. (J.A. 56).

Mr. Papai and Mr. Low, the other deckhand dispatched to the *Point Barrow* this same day, were provided with a ladder to do their work by the Port Captain. One end of it had been sawed off some days previously. After they had used this makeshift ladder together for about 3 hours, Mr. Low was assigned by the Port Captain to go to sea on another tug, leaving Mr. Papai to work unassisted. (J.A. 48-50).

Allegedly because there was no one to assist him by holding this sawed off ladder, Mr. Papai fell off it while climbing down it and was thereby injured. (J.A. 49-50).

B. PROCEDURAL HISTORY

In January 1990, Respondent John Papai filed his complaint against defendant Harbor Tug and Barge seeking damages under the Jones Act, 46 U.S.C.App §§688, *et seq.*, and for unseaworthiness under general maritime law. His wife, Respondent Joanna Papai, sued for loss of consortium.

HTB moved for summary judgment on the ground that Respondent John Papai was not a seaman within the meaning of the Jones Act and general maritime law. The District Court granted the motion on May 29, 1990.

Pursuant to leave of court, Papai filed a first amended complaint under Section Five of the LHWCA and for loss of consortium.

In denying reconsideration on the summary judgment, the District Court certified the question under 28 U.S.C. §1292(b) for interlocutory appeal, which was denied by the Ninth Circuit on October 30, 1990. The subject was then rebriefed and

reargued to the District Court in light of two recent Supreme Court decisions (*McDermott International, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991)), and the District Court reaffirmed that Papai was not a seaman on the basis that he did not have the necessary permanent connection with the vessel.

Contrary to what is stated on p. 6 of Petitioner's Brief, Papai did not make a LHWCA claim "soon after his injury." Instead HTB started making voluntary payments under the LHWCA despite Papai's protests that he was a Jones Act seaman. (Pet. App. 34a).

It was only after the District Judge made his final determination in 1992 that Mr. Papai was not a seaman that he proceeded toward the formal award that was needed to finalize the compensation lien for the negligence trial that was to begin on August 31, 1992.

The reason why a formal award is necessary is the requirement that the lien be liquidated to a sum certain by the time judgment is entered.

At the June 2, 1992, hearing and in violation of well established principles of judicial estoppel outlined in *Roth v. McAllister Bros., Inc.*, 316 F.2d 143,145 (2d Cir. 1963), HTB took a position diametrically opposite to that which had won it partial summary judgment and asked the Administrative Law Judge (ALJ) to dismiss Papai's LHWCA claim on grounds that he was a member of a crew of a vessel under 33 U.S.C. §902(3)(G). Plaintiff's workers compensation attorneys failed to raise *Roth*, or the doctrine of equitable estoppel in response. With all due respect to the attorneys who filed the compensation claim, this was not good lawyering. The ALJ erroneously concluded that the prior summary judgment did

not estop HTB from changing its legal position because the District Court's ruling was still subject to appeal. However, the federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as *res judicata* or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding *de novo*. 1B *Moore's Federal Practice* (2d ed.) ¶0.416[3.2] pp. III — 322 — 3 *see also, Hunt v. Liberty Lobby*, 707 F.2d 1493, 1497 (D.C. Cir. 1983). Unfortunately the ALJ ignored that rule, concluded all over again, without considering any evidence other than Respondent's testimony, that Mr. Papai was not a seaman, and issued a formal decision awarding him permanent disability LHWCA benefits in August of 1992. *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 205 (9th Cir. 1995). The ALJ cited *Wilander, supra*, but made no effort to measure Mr. Papai's situation against this Court's guidelines. Instead, he relied upon Benefits Review Board authorities to find that Respondent's assignment to any vessel or fleet of vessels was random, sporadic and transitory, and lacking in permanent connection so that Mr. Papai "could not be regarded as a member of the crew of any ship or fleet of ships." (Pet. App. p. 37a discussed at fn. 4 on p. 7 of Petitioner's Brief).

Sharp v. Johnson Bros., 973 F.2d 423 (5th Cir. 1992) which is the first and only circuit opinion that gives preclusive effect to an ALJ ruling was decided on September 25, 1992.

Papai's trial against HTB for negligence in the operation of the *Point Barrow* began on August 31, 1992, and the ALJ's formal order had been entered on August 27, 1992. Petitioner's Notice and Request for Allowance of Lien (J.A. 6) bears the same date, but was not entered on the trial court's minutes until September 2, 1992 and was not mentioned at any time during the trial.

By the time of oral arguments in conclusion of the trial, December 12, 1992, the sixty day deadline for appeal of the

ALJ formal order (i.e. October 27, 1992) had passed and no appeal had been filed.

When the trial judge observed on the record that Respondent was free to appeal his seaman status ruling, Petitioner did not call the trial court's attention to its view that the unappealed ALJ order precluded further litigation of the issue. Instead, this was not brought up until July 2, 1993, when Petitioner filed its Brief in the Ninth Circuit in opposition to Papai's appeal of the District Court's decision.

On December 12, 1992, after indicating that Papai was free to appeal the seaman status ruling, the District Judge found for defendant on the third-party action.

Papai appealed both the finding on non-seaman status and the finding against third party liability to the Ninth Circuit.

The decision below in the Ninth Circuit reversed on the issue of seaman status without reaching the merits of the third-party action, by finding that there was a triable issue of fact as to Papai's connection to the vessel under *Wilander, Gizoni* and *Chandris v. Latsis*, 115 S.Ct. 2172, 2183 (1995).

The decision below also held that Papai's litigation of his LHWCA claim did not bar his subsequent Jones Act claim, recognizing that a bar to relitigation would not serve the purpose for which it is usually employed because the parties are forced to take inconsistent positions under the Jones Act and LHWCA. (Pet. App. 12a).

There is no relevance to the fact that Respondent did not appeal the ALJ's decision in that a Respondent does not have

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[2]In so far as the decision below expanded upon the legal standards of *Chandris* to include employers beyond HTB, it is dictum because all of Papai's assignments, once he became a qualified deck hand (within the meaning of the IBU-HTB Deckhands Agreement) were with HTB.

standing to appeal the fact that an award has been made in his favor because he has not been "adversely affected by the award." *See, e.g. Simms v. Valley Line Co.*, 709 F.2d 409, 411 (5th Cir. 1983).

SUMMARY OF ARGUMENT

1. The decision below has correctly interpreted *Chandris* in concluding that the duties specified for workers dispatched under the IBU-HTB deckhands agreement show that it was certainly erroneous for the District Court to have decided seaman status against Mr. Papai by way of summary judgment.

Moreover, the identifiable group of vessels to which a worker must be connected to be a seaman may include vessels owned by more than one employer. But even if the decision below is incorrect in this regard, Mr. Papai still has the requisite connection because all of his 1989 assignments were with Petitioner under the IBU-HTB Deckhands Agreement.

2. This Court's recognition that the LHWCA and the Jones Act are mutually exclusive remedies does not mean that Congress intended that proceedings on one of these alternatives precludes the other. To give such meaning leads to an election of remedies.

The historical coexistence between damage suits and LHWCA remedies where, as here, the employer also owns the vessel shows that §905(a) of the Act was never intended to be absolute. Petitioner's reliance upon *Sharp* to support such an intention is misplaced because *Sharp*'s reasoning is based upon a misinterpretation of *Gizoni* combined with the Fifth Circuit's displeasure with the litigants' failure to inform it of significant developments in the pursuit of LHWCA remedies analogous to the present Petitioner's lack of candor toward the District Court as to the purported significance of the ALJ proceedings.

Even if there were an election doctrine and even if it could generally be applied to ALJ formal awards, it should not be applied herein due to the effect of four well settled exceptions to collateral estoppel, any one of which prevents the application of preclusive effect. They are: (1) the frequently expressed legislative intent that the LHWCA is designed to assist injured workers and to avoid harsh, incongruous results; (2) the requirement of actual litigation, which cannot be met, both because Petitioner had already obtained a favorable ruling by taking a contrary position and because the ALJ record is devoid of any indication that Petitioner introduced any evidence or made any arguments to show that Mr. Papai was a "member of a crew."; (3) the concept that an administrative decision cannot act to abridge a litigant's right to appeal an earlier decision on the same subject rendered by another tribunal; (4) a change in law subsequent to an administrative decision that affects its application in another tribunal entirely vitiates said application.

ARGUMENT

I. THERE IS NO FACTOR THAT WOULD DEPRIVE RESPONDENT OF SEAMAN STATUS UNDER THE JONES ACT WHILE WORKING ON A VESSEL IN NAVIGATION PURSUANT TO PETITIONER'S DECKHANDS AGREEMENT

Seaman status, which is required for recovery under the Jones Act, is a mixed question of law and fact. Nevertheless, it may be determined by summary judgment in appropriate circumstances. *Wilander*, 498 U.S. at 355-56, 111 S.Ct. at 817-18. By applying *Chandris* to the present facts, the decision below correctly concluded that this case did not present such a circumstance.

In essence the Deckhands Agreement amounts to an admission by Petitioner that Papai was a Jones Act seaman, not only on the day of the accident but on the 12 previous days in 1989 when he was assigned to work as a HTB deck hand.

It is entirely irrelevant that:

> Papai's jobs *with* HTB were transitory one or two day jobs that Papai obtained through the IBU hiring hall from time to time. Each of his jobs for HTB was self-contained not continuous. His work for HTB was sporadic and happenstance (Petitioner's Brief 41-42).

None of these facts puts Papai outside of *Chandris*. There is no evidence or even argument that Papai's duties were "essentially changed" during his 13 assignments pursuant to the Deckhands Agreement. His new work assignment occurred on January 1, 1989 when he began to be assigned by his union as a qualified deck hand under this agreement. Therefore these 13 assignments are the only work that should properly be considered in determining Mr. Papai's seaman status.

The facts that ". . . his work was day-to-day, and he lived, ate and slept at home" (Petitioner's Brief p. 42) do not make him "one of those land-based workers who have a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea."[3] Petitioner's Brief quoting from *Chandris*, 115 S.Ct. at 2190.

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[3]The "perils of the sea" test was originated with *Wallace*, *supra*, and is given substantially more weight by the *Chandris* dissent, 115 S.Ct. at 2194 and fn.2. However, the reasoning behind this doctrine has been termed "misguided" by *Cheavens, Terminal Workers' Injury and Death Claims*, 64 Tulane L. Rev. 361, 395-399 (1989), which says that the Jones Act and seaman's status is not ". . . a policy based on special perils encountered by seaman . . . " *Id.* at 397, text following fn. 179. The article collects data on "lost workdays" for various occupations that demonstrates

Petitioner's Brief quotes *Chandris* out of context in attempting to apply it to the present case. The next sentence after the language quoted above reads as follows (quoting from 1B. *A. Jenner, Benedict on Admiralty* §11, pp: 2-10.1 to 2-11 (7th ed. 1994):

> If it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity the test for seaman status will be satisfied.

Nowhere does *Chandris* speak of where the worker ate or slept or the length of his assignments as criteria for seaman status. It is the work that matters, and the total circumstances of that work are best defined by the Deckhands Agreement, where Petitioner describes Mr. Papai's duties. The pertinent parts read as follows:

> *Article 12. Maintenance and Cure*
>
> (a.) Crew members are entitled to maintenance and cure, on account of injury or illness incurred in the service of the vessel, and shall be paid maintenance at the rate of twenty-two dollars ($22.00) per day. Except in hardship cases, the

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that the work done by the core groups covered by the LHWCA is considerably more dangerous than that done by seamen on conventional deep sea ships and even more so when compared with Local Transportation Workers (such as Mr. Papai). *Id.* at 398, text accompanying fn 182. *Cheavens* concludes, as this Court should, that the ". . . .desire to look to exposure to peril of the sea as the litmus test of seaman status is not productive." *Id.* at 399. Moreover the adoption of such a litmus test carries a high potential for excluding inland towboat crew members from the Jones Act regardless of their connection to their vessels. It would also be entirely inconsistent with the time honored Congressional intent of the Jones Act to enact "a fault based compensation system" (to enforce) ". . . itinerant seaman's rights." *Cheavens*, *supra*, 64 Tulane L. Rev. at 398, top of the page.

Employer shall not be required to make payments under this rule more often than semi-monthly. (J.A. 73).

* * *

Article 23. Wages

* * *

(d.) In order to be employed as a qualified deckhand, he or she must provide, if requested to do so to the satisfaction of the Employer, that he or she:

1. Has good knowledge of vessels lines and towing winch, the placement, use and names of same.
2. Has fair knowledge of splicing lines.
3. Is a satisfactory helmsman and lookout.
4. Can satisfactorily chip, scale and care for the metal parts of a vessel.
5. Can satisfactorily paint when requested and do the necessary cleaning chores upon completion for the day.
6. Can properly care for and use tools.
7. Can do such other things required of a deckhand in order to work safely.

Any person who is classified as a qualified deckhand shall not be reduced in rating. (J.A. 75-76).

Article 30. Maintenance Work and Duties

(a.) During the time on duty the deckhand's duties shall consist of tying up and letting go as required

by the operation and normal maintenance work on the boat shall be performed during the hours of eight (8:00) a.m. to four (4:00) p.m. No maintenance work shall be required on Sundays or holidays.

(b.) Deckhands will be required to perform maintenance work in the engine room.

(c.) Sanitary work shall be performed as needed any time, but no unessential sanitary work shall be required on Sundays or holidays, or at night that could be deferred until the next day.

It is the considered opinion of all parties that each employee should adequately maintain his/her vessel within these limits. All employees shall share equally in this responsibility.

(d.) The on-watch deckhand shall conduct a check of the engine room status a minimum of two (2) times each watch while underway for vessel safety reasons and report same to the operator. (J.A. 77).

When these duties are measured against the guidelines of *Chandris*, there is no factor that would deprive Respondent of seaman status while working pursuant to this agreement.

These guidelines are as follows (115 S.Ct. at 2183):

> [W]e think that the essential requirements for seaman status are twofold. First, as we emphasized in *Wilander*, "an employee's duties must contribut[e] to the function of the vessel or to the accomplishment of its mission."

. . .

Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

* * * * * *

In our views, "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." *Wallace v. Oceaneering Intl.*, 727 F.2d 427, 432 (5th Cir. 1984). The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

* * * * * *

> [S]eaman status is not merely a temporal concept, but we also believe that it necessarily includes a temporal element. A maritime worker who spends only a small action of his working time on board a vessel is fundamentally land-based and therefore not a member of the vessel's crews, regardless of what his duties are. Naturally, substantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure.

Chandris, supra, 115 S.Ct. at 2191.

Thus, the inquiry is not whether Papai had a permanent connection with the vessel. The proper inquiry is whether Papai's

relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment. Scrutiny of the "total circumstances" is, necessarily, fact specific. On one hand, the status of a worker may change by a change in work assignment. On the other hand, it may be necessary to examine the work performed by the employee while employed by different employers during the relevant time period. As was stated by this Court in *Chandris*:

> [W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer. . . . When a maritime worker's basic assignment changes, his seaman status may change as well. . . . If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.

Id. at 2191-92.

The decision below found no reason that a group of employers who join together to obtain a common labor pool on which they draw by means of a union hiring hall (in this case, the IBU hiring hall), should not be treated as a common employer for purposes of determining a maritime worker's seaman status. If the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system. Under such circumstances, a maritime worker who regularly performs seaman's work is entitled to seaman status. Moreover, in the present case Papai actually worked for HTB on far more than a single occasion. In 1989, he worked for

that company on a dozen occasions over the two and a half month period preceding his injury. This circumstance should in itself provide a sufficient connection.

The "service with a particular employer" that Petitioner's Brief (pp. 31-39) attempts to limit to but one employer is part of this Court's discussion of how and why it is ". . . important that a seaman's connection to a group of vessels in fact be substantial in both (terms of duration *and* nature") (*Id.* at 2190).

The examples given from p. 2191 to p. 2192 of *Chandris* involve changes of assignment as between office work ashore and . . . "commitment of the worker's labor to the function of the vessel." This Court observes that ". . . if a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel related work made on the bases of his activities in his new position. *Id.* at 2191-2192, citing *Cheavens, supra,* 64 Tulane L. Rev. 361, 364-365, 389-390 (1989).

Not even the reasoning of *Reeves v. Mobile Dredging & Pumping Co. Inc.*, 26 F.3d 1247, 1256-1258 (3d Cir. 1994) cited and discussed at length on pp. 34-36 of Petitioner's Brief, strictly limits the Fleet Seaman Doctrine to but one employer.

Instead, it observes that ". . . the idea of one control is not entirely definite and will often depend on the circumstances." *Id.* at 1258. Therefore, the connection between the vessels in an identifiable group need not be one employer. In *Reeves*, the two employers involved, Mobile Dredging and Great Lakes Dredging, each had contracts with plaintiff's union. However, when Mr. Reeves was injured he was aboard a Mobile vessel that was not on a navigable body of water. Therefore, it was this non-navigability that vitiated any con-

nection that might have resulted from commonality of union. This is the same distinction made by *Stanfield v. Shellmaker Inc.*, 869 F.2d 521 (9th Cir. 1989) cited by *Reeves*, 26 F.3d at 1258 and fn.16. In *Stanfield*, as in *Reeves*, plaintiff was injured aboard a vessel operating in non-navigable waters. The Ninth Circuit refused to apply the Fleet Seaman Doctrine, not because plaintiff's prior service was not with vessels of the same employer, (which it was) but because the Doctrine cannot be used to connect non-navigable service to navigable. In essence, when one is injured aboard a non-navigable vessel, he is in the position of:

> . . . someone actually transferred to a desk job and in the company's office and injured in the hallway (who is) . . . not entitled to claim seaman status on the basis of prior service at sea" under *Chandris, supra,* 115 S.Ct. at 2191, bottom of the page.

No such problem exists here.

The seminal single employer Fleet Seaman Doctrine case is *Barrett v. Chevron U.S.A. Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986), quoted on pp. 33-34 of Petitioner's Brief. *Cheavens, supra,* 64 Tulane L. Rev. at 389-390 argues that the *Barrett* analysis is faulty because the percentage of time an employee spends working aboard vessels owned by a particular employer versus the percentage of time on land is not a useful or significant test for seaman status.

Moreover, as is pointed out by *Hall v. Professional Divers of New Orleans*, 865 F.Supp. 363, 365 (E.D. La 1994), *Barrett* did not overrule *Wallace, supra* which finds the nature of the work controlling as to seaman status, regardless of the mber of employers. The fact that *Chandris* cites *Wallace* with approval reinforces the interpretation of *Chandris* made by the decision below.

When one realizes that Mr. Papai's work assignments were made not by his employer, but by his union, it makes no sense to limit changes in assignments to but one employer. Instead, as is visualized by the decision below, where, as here, a group of employers join together to obtain a common labor pool from a union hiring hall, it is entirely logical to extend the "identifiable group" to all vessels owned by each of these employers, which is the effect of the Ninth Circuit's language on 67 F.3d at 207, Pet. App. 8a.

Therefore, the only factor that could deprive this Respondent of seaman status while working under this agreement would be the withdrawal of the vessel from navigation. *Wilander, supra,* 111 S.Ct. at 807. There is no such withdrawal here.

II. THE FORMAL AWARD OF LHWCA COMPENSATION BENEFITS SHOULD NOT PRECLUDE PAPAI'S CLAIM TO SEAMAN REMEDIES

This Court's recognition that the LHWCA and the Jones Act are mutually exclusive compensation regimes, *Chandris, supra,* 115 S.Ct. at 2183, does not mean that Congress intended that proceeding under one act should preclude the other. To give such a meaning leads to an election of remedies. The "plain text" (as the term is used on p. 10 of Petitioner's Brief) of the LHWCA that the liability of an employer for workers compensation is exclusive is undermined by equally plain language that allows the worker to bring a separate tort action for negligence on the part of the vessel upon which he is injured. It is only where, as here, the worker's employer also owns the vessel that the legislative history and the policy underlying the statute require that exclusivity give way to the tort remedy.

The principles of collateral estoppel require that the parties be the same in both proceedings. Unless the employer also owns the ship, the worker could not be precluded from the Jones Act by the LHWCA formal award because the shipowner had not been a party to the ALJ proceedings. Therefore, there should be no preclusion *per se* at any point while both remedies are being pursued.

If there is to be a preclusion *per se* there is no reason for it to occur at the time of a formal award rather than at some other time.

Even if there is to be preclusion *per se* at the time of the formal award, well-settled exceptions to collateral estoppel prevent its application to the case herein.

A. *Civil Suits Against Vessels and LHWCA Remedies are Not Mutually Exclusive*

The Jones Act was the first statute to provide a cause of action for vessel negligence in 1920.

The 1922 Congress passed a statute subjecting land based workers to state compensation. As the Petitioner's Brief observes on p. 13, this Court struck it down, and then interpreted the term "seaman" in the Jones Act "to include stevedores employed in maritime work on navigable waters." *International Stevedoring Co. v. Haverty,* 272 U.S. 50 (1926).

In 1927 the LHWCA was enacted to provide an exclusive compensation remedy for land based maritime workers except for "a master or member of a crew of any vessel," who remained covered by the Jones Act.

Notwithstanding the original exclusivity language in the LHWCA, this Court afforded all maritime workers a seaman's claim for unseaworthiness against shipowners in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946).

The *Sieracki* decision was overturned by the 1972 amendments to the LHWCA which eliminated unseaworthiness causes of action for all maritime workers except "a master or a member of a crew of a vessel."

However, these amendments retained the right of all maritime workers to assert negligence actions against the owners of ships upon which they have been injured. 33 U.S.C. §905(b).

In its decision of *Chandris, supra,* 115 S.Ct. 2183-2184 this Court has ruled that the LHWCA term "master or member of a crew of a vessel" is a refinement of the term seaman in the Jones Act, so that someone who is a ". . . member of a crew of a vessel" cannot be covered under the LHWCA.

Nevertheless, "a claimant found to be an employee under the LHWCA" is by no means limited to a compensation remedy against his employer, such as Petitioner's Brief argues on pp. 10-15.

Instead, when an employer chooses to own the ship on which his employee is injured, 33 U.S.C. §905(a) must defer to 33 U.S.C. §905(b), under this Court's decision of *Jones & Laughlin Steel Co. v. Pfiefer,* 462 U.S. 524 (1983).

There, as here, the employer contended that the exclusivity provision of 905(a) was paramount, and absolved ". . . it of all other responsibility for damages." *Id.* at 530.

This Court disagreed. In the opinion by Justice Stevens, the availability of seaman's remedies to all maritime workers prior to 1972 was noted. *Id.* at 521 and fn. 7.

This Court concluded that although the 1972 amendments changed the character of a non-seaman maritime worker's cause of action against the vessel by substituting negligence for unseaworthiness, Congress clearly intended to preserve

this right, as was evidenced by unambiguous language in the House Committee Report. *Id.* at 532.

As this Court concluded:

> If respondent had been employed by an independent stevedore at the time of his injury, he would have had the right to maintain a tort action against the vessel. We hold today that he has the same right even though he was in fact employed by the vessel. *Id.* at 532.

In the wake of *Pfiefer,* some shipowner employers continued to argue that its application was restricted to traditional longshoremen. These arguments were rejected by *Guilles v. Sea-Land Service,* 12 F.3d 381, 387 (2d Cir. 1993) which collects decisions from other circuits to the effect that the cause of action in 905(b) is available to non-longshore persons suing an employer-vessel and takes comfort from excerpts of the House Committee Report that rejected an industry proposal that vessels should be treated as joint employers in favor of language holding vessels liable for damages caused by their fault regardless of whether the owner happens to be the workers' employer under the LHWCA.

In summary then, there is nothing in the case law or the legislative history of the LHWCA that dictates an election of remedies so as to make any finding by a Department of Labor ALJ preclusive *per se* of any action against his employer for the same injury.

B. Sharp is Defectively Reasoned

Page 18 of Petitioner's Brief cites *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992) as "the most prominent case "holding that a formal award of LHWCA benefits precludes a further claim to seaman benefits.

In truth, it is the only case that reaches this result under present law.

Fontenot v. AWI, Inc., 923 F.2d 1127, 1132-1133 (5th Cir. 1991), the next case cited on p. 18 of Petitioner's Brief, does not involve a formal award of compensation. Moreover, the Fifth Circuit made it clear that it did not decide the issue of whether a finding of LHWCA coverage sought and obtained by the injured worker should preclude any subsequent action against his employer for the same injury, for two additional reasons. First, because a decision on this issue would not affect the outcome of the case, and second, because the parties had not raised this issue at trial or on appeal. *Id.* at 1133.

Fontenot also inaccurately observes that workers' compensation is the exclusive remedy for all maritime workers covered by the LHWCA. *Id.* at 1132. This observation ignores the fact noted by *Gizoni, supra*, 502 U.S. at 90-92, that some maritime workers may be Jones Act seamen performing a job specifically enumerated under the LHWCA. Since *Fontenot* was handed down several months before this Court's decision of *Gizoni*, this observation incorrectly states the present law.

Hagens v. United Fruit Co., 135 F.2d 842 (2d. Cir. 1943), the third case cited by Petitioner on this issue, long ago ceased to be good law.

It was decided in 1943 when 33 U.S.C. §903(a) still flatly provided that compensation was not payable in respect of the disability of a member of a crew of any vessel. A finding as to nonmembership of a crew of a vessel was what was then called a "finding of jurisdictional fact." Id. at 843. The rule in *Hagens* was based on preemptive jurisdiction, not collateral estoppel. Such strictures have long since been removed by Congress.

33 U.S.C. §903(a) was amended, together with the rest of the Act, in 1972, and, again in 1984 and no longer speaks of crew members. Those amendments changed what was essentially only a situs test of eligibility for compensation to one looking to both the situs of the injury and the status of the injured party. *Northeast Marine Terminal Co. Inc. v. Caputo*, 432 U.S. 249, 264-265 (1977).

Ever since the 1984 amendments, the so-called crew member exclusion has resided among the Act's status provisions in 33 U.S.C. §902(3)(G) where it is stated as a statutory exception to the definition of a covered employee. Rather than posing questions of jurisdictional fact, the modern status test merely presents issues of coverage. *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 1359 (9th Cir. 1981).

Finally, *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995), cited on p. 19, fn. 22 of Petitioner's Brief and at fn. 6 of the decision below, certainly does not hold that a formal award of LHWCA benefits precludes a further claim for seaman remedies. Instead, it holds that a formal award of compensation *does not* bar a claimant from Jones Act relief, at least when the record does not reflect an express finding that the claimant was not a "master or member of a crew." *Id.* at 315.

One reason why *Sharp* reaches a result contrary to the decision below is its misapplication of the reasoning of *Gizoni, supra*.

The decision below, 67 F.3d at 206-207, Pet. App. 10a-11a, focuses on this Court's two statements in *Gizoni* that:

> (1) . . . the LHWCA clearly does not comprehend . . . a preclusive effect (by way of collateral estoppel) as it specifically provides that any amounts paid to an employee for the same injury, disability or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA (and)

> (2) . . . where full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear. (Citations omitted.) Argument by amicus would force injured maritime workers to an election of remedies we do not believe Congress to have intended. *Id.* at 207, 11a (emphasis added).

It is certainly logical to extend this language to its "next step" as did the decision below, 67 F.3d at 208, Pet. App. 12a. Petitioner's Brief p. 20 at fn. 20 argues that such a step ". . . is not a logical one" but fails to explain why.

Sharp, largely disregarded this reasoning, focused on the fact that *Gizoni*'s benefits had "never actually been litigated", and ignored this Court's language quoted above as to the "preclusive effect" that the LHWCA never intended and the absence of detrimental reliance by removing ". . . the threat of double recovery."

It also outrightly rejects the teachings of its own decision of *Simms v. Valley Line Co.*, 709 F.2d 409 (1983) cited in *Gizoni*, where the arguments of legal scholars were quoted:

> . . . who argued that even the payment of benefits pursuant to a formal award in a contested proceeding might not be fatal to a Jones Act action if the compensation award was made without a proper adjudication of the claimant's status as a harbor worker." 973 F.2d at 425.

An analysis of *Simms* suggests that the Fifth Circuit was well on its way to the result reached by the decision below before it was derailed by its dissatisfaction with counsel in *Sharp*.

Mr. Simms was a night watchman who fell into an open hold on a barge owned by his employer, Valley Line Company. He

brought suit under the Jones Act and also filed for LHWCA benefits because he was uncertain as to whether his duties tending the barge made him a member of its crew.

In his LHWCA proceeding, an ALJ determined that Mr. Simms was not a member of the barge's crew and awarded him benefits. The compensation carrier appealed. The BRB dismissed the claimant from the appeal because he was not adversely affected, just as it probably would have done in the present case had Mr. Papai realized the potential effect of *Sharp* (decided on September 25, 1992) on his ALJ decision and appealed it in the time that elapsed after his civil trial had been completed (September 17, 1992) but before December 16, 1992, when it was argued and decided and the time to appeal the ALJ decision to the BRB had expired (as of October 27, 1992).

In any event, Mr. Simms, concerned with the effect of the ALJ ruling on his Jones Act suit, petitioned the Fifth Circuit for review of the BRB's decision to dismiss him from the compensation carrier's appeal. *Id.* at 411.

The Fifth Circuit recognized the "zone of uncertainty" between the Jones Act and the LHWCA and the requirement that each of them ". . . requires a liberal application in favor of claimant to effect its purposes." *Id.* at 411.

It then discussed the "arguments of legal scholars" deliberately disregarded in *Sharp* and relied upon in *Gizoni*, 122 S.Ct. at 494, text accompanying fn. 5, to the effect that a former award should not preclude a Jones Act suit. 709 F.2d at 412 and fns. 3 and 5.

However, *Simms* stopped short of actually deciding that a formal order would not be preclusive by finding that the BRB dismissal of the claimant was not a "final order" in view of the compensation carrier's ongoing appeal of the ALJ's award of

LHWCA benefits, and dismissed claimant's petition to review the ultimate outcome of the BRB proceedings as premature.[4] *Id.* at 413.

Perhaps more significantly, the *Simms* court observed (*Id.* at 413 and fn.6) that it was

> . . . entirely possible . . . that the district court might refuse to give collateral effect to the status determination here made for purposes of the compensation act.

In the present case when the ALJ made his decision that Mr. Papai was not a member of the crew of a vessel, *Simms* left the District Judge free to refuse collateral estoppel ***had the ALJ decision been brought to his attention***, as it should have under Petitioner's interpretation of *Sharp*. The fact that it was not[5] is closely analogous to the failure of the parties in *Sharp* to inform the Fifth Circuit of the approved settlement that appears to have heavily influenced it into reaching the ill-advised decision upon which the present petition is founded.

The following analysis of *Sharp's* convoluted and unique procedural history suggests another reason why *Sharp* reached such an ill-reasoned result.

The plaintiff there, Earnest Sharp, initiated administrative proceedings with the deputy commissioner shortly after his November 1985 accident. After the deputy commissioner notified the parties that the injury "appear[ed] to fall under the jurisdiction of the [LHWCA]", *Sharp, supra*, 973 F.2d at 424, the employer began to pay voluntary benefits. In November of 1986, however, Sharp filed a parallel Jones Act suit in District Court. The employer promptly terminated LHWCA benefits, and "raised the defense that Sharp was a Jones Act seaman and thus not eligible for longshore compensation." *Id.* The parties did not request an ALJ hearing, but pushed the District Court case to trial instead.

In June of 1989, the District Court granted the employer a directed verdict in Sharp's Jones Act case "on the grounds that the barges were not vessels and that he was not a seaman." *Id.* Sharp appealed that determination to the Fifth Circuit the following October. By September of 1989, however, Sharp had settled his LHWCA claims for $225,000. A final release was executed on October 5, 1989 (just as the Jones Act case was being transferred to the Court of Appeals), and the ALJ promptly approved the settlement. *Id.* But the parties never advised the Court of Appeals of their agreement. In November of 1990, the Fifth Circuit therefore reversed the directed verdict and remanded the case for another trial "on the ground that a fact question existed as to whether Sharp worked aboard a fleet of vessels and thus was a seaman.

On remand, the District Court granted the employer summary judgment on grounds that Sharp's LHWCA settlement comprised an election against his Jones Act rights. *Sharp, supra*, 973 F.2d at 424-425. The Fifth Circuit affirmed under the doctrine of equitable estoppel, ruling that "where the ALJ issues a compensation order ratifying a settlement agreement, a 'formal award' should be deemed to have been made under *Gizoni*, and the injured party no longer may bring a Jones Act suit for the same injuries." *Id.*, at 426.

The result and rationale in *Sharp* appear at least, in part, to reflect the Fifth Circuit's weariness with the case and an

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[4]This approach would not be likely today bcause of the administrative affirmance of longstanding appeals of ALJ decisions ot the BRB effected as of September 11, 1996, by Public Law 104-106.

[5]As is shown by *Explosives Corp of America v. Garlam Enterprises*, 817 F.2d 894, 900-902 (1st Cir. 1987) cited and discussed in the 1996 supplement to 18 *Wright, Miller and Cooper, supra*, §4404 p. 28 & fn. 21, it is inexcusable for a litigant to fail to raise the preclusive effect of a decision in another tribunal before the district court renders judgment and then assert it on appeal. The doctrine of laches applies to such conduct. *Id.* at 901.

annoyance with the tactics that brought it there. As the Fifth Circuit noted:

> . . . [W]e are distressed by the conduct of the attorneys for Sharp, Johnson Brothers, and Wausau during [a] previous appeal. Although we have no basis upon which to ascertain their motives, we are surprised that the parties failed to bring to our attention the fact that they had settled at least one aspect of their dispute. We recognize that counsel may legitimately have believed that the LHWCA settlement was irrelevant to the Jones Act action. Nevertheless, candor and respect for this court would dictate that the parties inform us of so significant a development in their litigation. *Sharp, supra,* 973 F.2d at 427, fn. 3.

In the present case, although *Sharp* had been decided on September 25, 1992, Petitioner did not inform the trial judge on or before December 16, 1992, that the ALJ decision on August 27, 1992, as affected by the reasoning of the Fifth Circuit decision (of *Sharp*), precluded Mr. Papai from appealing his Jones Act status, contrary to the belief that he was "free to appeal" expressed on the record by the District Judge in open court. (J.A. 82).

It seems possible that Petitioner may have decided not to mention the potentially preclusive effect of the ALJ decision to the trial judge to give itself a fall-back position in the event that the district court would be reversed on the status issue. Fortunately for Respondents, however, not only laches, but also well-settled exceptions to collateral estoppel, to be discussed *infra*, will not allow such conduct to succeed.

C. There is Nothing About the Nature of a Formal Award that Should Make it Preclusive Per Se

In *Pallas Shipping Agency Ltd. v. Duris,* 461 U.S. 529 (1983) this Court ruled that a worker's acceptance of voluntary compension benefits did not give rise to the assignment of his claim for negligence against the shipowner to his employer.

This Court traced the legislative history and case law and concluded that nothing short of a formal order could lead to such an assignment. 461 U.S. at 535.

The Court observed that although the LHWCA is generally a covered worker's exclusive recovery from his employer, the worker ". . . does not relinquish any claim against the shipowner, charterer or other third party."

When the LHWCA was originally enacted in 1927, the injured worker was required to elect between the receipt of compensation and a damages suit against a shipowner. In 1938 the LHWCA was amended to delete this election of remedies. *Id.* at 536 and fn. 4.

This Court observed that the requirement of a formal award was designed to protect the worker from the unexpected loss of his rights against a negligent third party.

The opinion quotes from the House Committee Report of the 1938 amendments as to the severe injustice that could result from acceptance of compensation benefits without knowledge of the effect upon one's rights. 461 U.S. at 536.

The opinion goes on to explain how the 1959 amendments deleted all election of remedies requirements from the act. 461 U.S. at 537 and fn. 5.

Therefore, not only was it improper to fail to raise the preclusive effect of the ALJ decision in the trial court, it would

compound the error committed by the decision below in considering it on appeal by forcing an election on this basis.

D. Even if There Were an Election Doctrine and Even if it Applied to the Time of a Formal Order, Well-Settled Exceptions to Collateral Estoppel Prevent its Application Here

1. There is Nothing in the LHWCA That Shows That Congress Intended That an ALJ Formal Award Would Preclude a Jones Act Suit.

Under the principles of *Astoria Fed. Sav. and Loan v. Solomino*, 501 U.S. 104, 111 S.Ct. 2166 (1991) and the long-standing legislative history and judicial interpretations discussed earlier in this brief, there is nothing in the LHWCA that shows that Congress ever intended to force an injured worker into an election of remedies, the interpretation sought by Petitioner herein.

Contrary to what is argued on p. 23 of Petitioner's Brief, the text of §905(a) as to exclusive liability is not intended to be absolute. The text of §905(b) preserves third-party tort remedies against the employer if he is also the owner of the ship upon which the injury occurs.

This is the situation here, and, thus HTB's discussion about other cases where third party liability is not available simply misses the mark.

Moreover, there would be no reason to include language about the Jones Act in §903(e) if Congress intended that a formal award would preclude a Jones Act Suit. Given both §903(e) and §905(b) the inference is clear that §905(a) is not absolute, contrary to what is argued on p. 24 of Petitioner's Brief.

Ultimately, this Court has already held that Congress did not intend to force an election of remedies when it provided

that any sums paid under the Jones Act would be a credit against any liability imposed by LHWCA. *Gizoni, supra*, at fn. 5.

2. Petitioner Has Not Proved That This Issue Was Actually Litigated

Page 21 of Petitioner's Brief recognizes that one requirement of collateral estoppel is that ". . . the issue (be) actually litigated in the administrative proceeding."

Collateral estoppel is an affirmative defense, so that the party seeking preclusion has the burden of proving said litigation. *Freeman United Coal Mine Co. v. OCWP*, 20 F.3d 289, 293 (7th Cir. 1994). This Petitioner cannot do.

Instead, it appears that Petitioner did all it could at the ALJ hearing to make sure that Papai was not found to be a "member of a crew". It certainly introduced no evidence nor made any argument to the contrary. Therefore, it cannot bear the burden of proving that the issue was actually litigated.

A review of the ALJ's Decision and Order counter-indicates such litigation. The employer argued that the ". . . claimant may have been a Jones Act seaman." (Pet. App. 35a) but provided orders from the District Court showing that he was not. (*Id.* at fn.2).

The only evidence upon which the ALJ relied was Mr. Papai's testimony that he lived on the shore, not the ship and had assignments of only one days' duration. The ALJ then applied this testimony to a pre-*Wilander* BRB decision and concluded that Mr. Papai was not a member of a crew. (Pet. App. 37a). This is hardly "actual litigation."

3. *The Later ALJ Decision Cannot Be Used to Preclude Appeal of the District Judge's Ruling on Seaman Status*

Freeman United, supra also poses " a more fundamental problem" to the assertion of collateral estoppel in the present case. *Id.* at 294.

This problem is that a decision in a second proceeding in another tribunal cannot act to affect the eventual outcome of an earlier one. This concept is discussed in detail in 18, *Wright, Miller and Cooper, Federal Practice and Procedure* §4404 at 30 (1981), as augmented by its 1996 supplement, citing later cases in fns. 19, 20 and 21.

Practically speaking, this means that, regardless of what the ALJ or the compensation attorneys may have thought, the ALJ decision cannot be used to affect the eventual outcome of the district judge's original decision that Mr. Papai was not a Jones Act Seaman when he was injured. In a way, this is obvious. This ALJ's decision " . . . should not reach backward by way of preclusion . . .." *Cycles Ltd. v. Navistar Fin. Corp.*, 37 F.3d 1088 (5th Cir. 1994), cited by *Wright, Miller and Cooper, supra* at fn. 21.

4. *In the Event that this Court Decides to Follow the Reasoning of Sharp, it Should Not Be Used to Preclude Respondents Herein*

In the final analysis, collateral estoppel is a discretionary doctrine that only applies under the law existing at the time that the decision was made. *Brock v. Williams Enterprises of Georgia Inc.*, 832 F.2d 567, 574 (11th Cir. 1987) explaining *Commissioner v. Sunnen*, 333 U.S. 591 (1948) in light of Restatement (Second) Judgments §28 (2)(b) (1982).

On August 27, 1992, the only reported case in the country that had addressed the Issue, *Simms*, suggested that the Fifth

Circuit was on its way to deciding that a formal award would not be preclusive. If this Court now decides to follow the reasoning of *Sharp*, the ALJ decision should not be given preclusive effect because the application of such reasoning would be a "change of legal principles" from what existed on August 27, 1992.

This doctrine is also mentioned in Justice White's concurring opinion in *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 180 and fn. 1 (1984) as an application of Restatement (Second) Judgments §28 Comment C (1982) as follows:

> . . . relitigation is not precluded if the issue is one of law and . . . (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or to avoid inequitable administration of the laws . . .

If this Court decides to give preclusive effect to ALJ rulings in Jones Act cases that a claimant is not a "member of a crew," such decision should not be made applicable to the present ALJ ruling because there was no way that any ALJ on August 27, 1992, could know that his ruling would have this effect. For this Court to follow the reasoning of *Sharp* instead of the reasoning of *Simms*, upon which the ALJ had a right to rely (as the only decision in the county on the subject at the time) would represent an intervening change in the applicable legal context that would make it inequitable to apply it herein. This is an alternative ground for affirmance.

CONCLUSION

The Court of Appeals should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I. THE FORMAL AWARD OF LHWCA COMPENSATION BENEFITS SHOULD PRECLUDE FURTHER CLAIM TO SEAMAN REMEDIES.

It is common ground in all the briefs [1] that seaman remedies and LHWCA remedies are mutually exclusive, but that until a claimant's status is determined, the claimant may pursue both remedies. What is at issue is whether a claimant who has received a formal award of LHWCA compensation is precluded from further pursuing seaman remedies.

A. To Uphold Section 905(a) And The Intent Of The LHWCA, A Formal Award Of LHWCA Benefits Should Per Se Preclude Further Seaman Remedies.

A compensation order awarding LHWCA benefits should per se preclude further seaman remedies. The alpha and omega of this issue [2] is 33 U.S.C. § 905(a), which states:

> The liability of an employer prescribed in § 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury . . .

HTB's "liability" under the LHWCA was established by the ALJ's compensation order.[3] Thus § 905(a) precludes

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[1] For convenience, Harbor Tug and Barge Company ("HTB") refers to all arguments in support of Respondent as those of "Papai".

[2] "Neither [the LHWCA claimant] nor the Ninth Circuit has attempted to base their position on the language of the statute, where analysis in a statutory construction case ought to begin, for 'when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.'" *Metropolitan Stevedore Co. v. Rambo*, —— U.S. ——, 115 S.Ct. 2144, 2147, 132 L.Ed.2d 226, 231-232 (1995), citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992).

[3] Compensation orders establishing "liability" under the LHWCA can be issued in two other ways. One is by way of an order by the District Director following agreement on controverted issues. 20 CFR § 702.315. The other is by way of 33 U.S.C. § 908(i). A § 8(i) "settlement" is not like a civil settlement. It is akin to a

HTB's further employer liability under the Jones Act or general maritime law. The preclusive effect of § 905(a) results from the statute itself and does not depend upon the application of the doctrine of collateral estoppel.

1. *The Insurance Requirement Of § 905(a) Does Not Affect The Exclusivity Of The Employer's Liability.*

Section 905(a) states one exception to the exclusivity of the employer's liability: when the employer fails to obtain LHWCA insurance or qualified self-insurance.[4] Papai argues that this proves that the exclusivity of the employer's liability under § 905(a) is not "absolute", and that therefore the Court should infer or create additional exceptions. A more reasonable conclusion is that where Congress intended an exception to the exclusivity of the employer's liability, Congress stated that exception expressly. The LHWCA does not contain any express exception to the exclusivity of the employer's liability under §905(a) when the claimant also files a Jones Act claim.

2. *Section 905(b) Does Not Gainsay The Exclusivity Of The Employer's Liability Under § 905(a).*

Section 905(b) allows an injured LHWCA worker to sue the "vessel" as a "third party" for negligence. 33 U.S.C. § 905(b). The vessel includes its owner and operator.[5] 33 U.S.C. § 902(21). Thus, for example, an injured longshoreman who slips on oil on the ship's deck caused by the shipowner's negligence (including that of its crewmember employees) can recover from the vessel in rem or from the shipowner.

Sometimes the same company both employs an injured LHWCA worker and is the shipowner. If § 905(a) and

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stipulated judgment. See 20 CFR § 702.241-243. It results in a compensation order requiring the employer to pay LHWCA benefits. Penalties are imposed for failure to pay those benefits. 33 U.S.C. § 914(f); *Reid v. Universal Maritime Service Corp.*, 41 F.3d 200, 201 (4th Cir. 1994).

[4] No such claim has been made in this case.

[5] For convenience, HTB refers to both as "shipowner".

§ 905(b) were read to be contradictory, one LHWCA worker would be denied the right to sue the vessel and shipowner for negligence, whereas a fellow LHWCA worker injured under the same circumstances would be allowed to sue, simply because the former's employer also is the shipowner, but the latter's is not. To avoid this anomaly, the courts have developed the "dual capacity" doctrine. That doctrine allows an LHWCA worker to sue the shipowner for negligence under § 905(b) even if the shipowner also is his employer, but only for negligence in its shipowner (not employer) capacity.[6]

Papai argues that § 905(b) also should be read to allow a claimant to sue the dual shipowner/employer under the Jones Act and general maritime law. That interpretation is unprecedented and would eviscerate the exclusivity of the employer's liability under § 905(a). A seaman's remedies for negligence under the Jones Act and for unseaworthiness under the general maritime law are *solely against his employer.*[7] Section 905(b) has not been interpreted to allow the shipowner/employer to be held liable as an employer. Thus § 905(b), as interpreted by the dual capacity doctrine, preserves the employer's exclusivity of liability under § 905(a) insofar as seaman remedies are concerned.[8]

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[6] Thus, for example, assume that HTB as a dual shipowner/employer hires a shoreside maintenance painting gang (LHWCA workers, not seamen) to paint its vessel, and also has an operational crew aboard. Assume that one member of the maintenance painting gang is injured when he is negligently bumped off a ladder while painting. If another member of the painting gang bumps the ladder, that negligence would be in HTB's employer capacity. If a ship's crewmember bumps the ladder, that negligence would be in HTB's shipowner capacity. In the case at bar, the District Court found no negligence by HTB in its shipowner capacity.

[7] *Cosmopolitan Shipping v. McAllister*, 337 U.S. 783, 69 S.Ct. 1317, 93 L.Ed. 1692 (1949); *Allen v. United States*, 338 F.2d 160, 162 (9th Cir. 1964).

[8] The main differences between a negligence cause of action under § 905(b) and seaman remedies are that the latter includes a cause of action for unseaworthiness, and the causation require-

The seminal Supreme Court case on the dual capacity doctrine was *Reed v. S.S. YAKA*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963). In that case Reed, a longshoreman, sued the ship's operator, who also was his stevedore employer, when Reed fell because a defective pallet on the ship broke. The Court allowed Reed to sue the defendant under § 905(b) in its capacity as shipowner, not as a seaman's employer under the Jones Act.[9]

The latest Supreme Court case to directly address the dual capacity doctrine was *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). Pfeifer, a longshoreman, was injured while loading a vessel when he fell on snow and ice that was negligently left on the gunnels. His stevedore employer also operated the vessel on which he was injured. Having received his LHWCA benefits, Pfeifer brought an action under § 905(b) against the defendant in its capacity as shipowner (not as an employer under the Jones Act). The Court allowed the action, noting: "Of course, § 5(b) does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." 462 U.S. at 530, n.6.[10]

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ment in a Jones Act negligence cause of action is slight. *See* 1 Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994), § 6-22, pp. 319-324, and § 6-25, pp. 333-380.

[9] In 1963, when *Yaka* was decided, a longshoreman could sue the vessel for unseaworthiness under § 905(b). The 1972 amendments to the LHWCA eliminated unseaworthiness as a ground of liability under § 905(b).

[10] *See also Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 87 n.3, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991). Lower courts uniformly have held that under § 905(b) an LHWCA worker can sue a dual shipowner/employer defendant as a third party for negligence, but not for Jones Act employer liability. *See Levene v. Pintail Enterprises, Inc.*, 943 F.2d 528, 531 (5th Cir. 1991); *Guilles v. Sea-Land Serv.*, 12 F.3d 381 (2d Cir. 1993); *Roach v. M/V AQUA GRACE*, 857 F.2d 1575 (11th Cir. 1988). *See generally* Frazor T. Edmondson, *Toward A Vessel Owner's Interpretation Of Dual Capacity*, 18 Del. J. Corp. L. 477 (1993).

3. *Section 903(e) Does Not Evidence Congressional Intent To Invalidate The Exclusive Liability Provision Of § 905(a) Or Preclude The Application Of Collateral Estoppel.*

33 U.S.C. § 903(e) states:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46 (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this chapter.

Papai contends that § 903(e) both vitiates the exclusive liability provision of § 905(a) and evidences Congressional intent precluding the application of collateral estoppel to an ALJ finding on the claimant's status. Section 903(e) should not, however, be so interpreted.

a. Section 903(e) was passed in 1984 in the wake of *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980). In that case employees of Sun Ship, which was a shipbuilder and repairer, were injured and filed for state worker's compensation. Their injuries also arguably fell within the ambit of the LHWCA. Sun Ship argued that the LHWCA was exclusive and preempted state worker's compensation laws. The Supreme Court disagreed, based upon the historical interplay between state worker's compensation acts and the LHWCA. The Supreme Court on several previous occasions had held that "maritime but local" injuries were subject to the concurrent jurisdiction of both state worker's compensation laws and the LHWCA, and either remedy scheme could apply to a given injury, at the claimant's choice. (447 U.S. at 717-719.) The Court stated that the 1972 Amendments to the LHWCA, which extended the LHWCA's coverage landward, supplemented rather than supplanted state worker's compensation laws. (447 U.S. at 719-720.) Thus the Court in *Sun Ship* allowed the employees to collect benefits under the state worker's compensation law.

The *Sun Ship* case differs from Papai's case. Whereas the Supreme Court has determined that state worker's

compensation laws and the LHWCA are concurrent remedy schemes, the Court has repeatedly found that the LHWCA and the Jones Act are mutually exclusive remedy schemes. The Court in *Sun Ship* stated, as it had done in *Calbeck v. Travelers Ins. Co.*,[11] that because state compensation laws and the LHWCA are concurrent, § 905(a) was "not involved." (447 U.S. at 723, n.4.) Section 905(a) is involved in Papai's case. In *Sun Ship* the issue was not whether the claimants could pursue two remedies (state and LHWCA compensation) to conclusion and then pick the higher one, but whether the claimants could recover state worker's compensation as a remedy at all. While the Court in *Sun Ship* noted that the claimants' potential entitlement to LHWCA benefits may not be precluded because state worker's compensation awards generally are not treated as final or conclusive, the Court reserved decision on the issue. (447 U.S. at 724, n.6.) In Papai's case, the issue of preclusion of a second remedy is presented.

b. Section 903(e) was added to the LHWCA in 1984 as part of a package of amendments.[12] Given the line of cases through *Sun Ship*, the main purpose of § 903(e) is to prevent a double recovery when state worker's compensation laws and the LHWCA are concurrent.[13] The legislative history of § 903(e) gives no guidance as to why Jones Act payments are included.

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[11] 370 U.S. 114, 132 n.16, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962).

[12] Longshore and Harbor Workers Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (codified at 33 U.S.C. § 901 *et seq.*).

[13] ". . . [D]ouble recovery was a possibility before the enactment of section 903(e). When it enacted section 903(e) in 1984, Congress intended to overrule *United Brands Co. v. Melson*, 594 F.2d 1068 (5th Cir. 1979). *See* 130 Cong. Rec. 8326 (1984) (explanation of House amendment to S. 38); 130 Cong. Rec. 25905 (remarks of Rep. Erlenborn). In *Melson*, the court held that an employee may recover compensation under both the LHWCA and the state [compensation] act, and there was no requirement in the LHWCA that the employee's federal award be reduced by the amount of the state settlement. *Melson*, 594 F.2d at 1074-75. Thus, the legislative history shows that Congress intended to prevent double recovery by broadening an employer's right to receive an offset." *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1350 (9th Cir. 1993). *See also* the legislative history of § 903(e) in the House Report, which states only: "This section also provides that any compensation received by a worker for the same injury under another workers' compensation law shall be credited against compensation received under this Act." H.R. Rep. No. 98-570, 98th Cong., 1st Sess., pt. 1, at 26 (1983).

Section 903(e) also must be viewed with the asymmetry of the LHWCA and the Jones Act in mind. The preclusive effect of the employer's liability under the LHWCA is stated in § 905(a). The Jones Act, conversely, has no language equivalent to § 905(a). Therefore while an LHWCA compensation order may preclude a subsequent Jones Act claim on two grounds—§ 905(a) and collateral estoppel—a Jones Act award may preclude a subsequent LHWCA claim only on the ground of collateral estoppel. Thus § 903(e) may have been drafted to include payments under the Jones Act to cover the situation in which a Jones Act payment has been made but—for any of several reasons—collateral estoppel does not apply.[14]

If Congress meant to rescind § 905(a) in the 1984 Amendments to the LHWCA, it would have done so directly. No legislative history and no case law precedent supports the proposition that § 903(e) was intended to retract the exclusivity of the employer's liability under § 905(a).

4. *Enforcing § 905(a) Or Applying Collateral Estoppel Does Not Create An Inequitable Election Of Remedies.*

HTB does not contest this Court's ruling in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 116

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[14] For instance, the Jones Act payment may be made pursuant to a settlement. This is the only context in which § 903(e) actually has been applied to an LHWCA claim following a Jones Act payment. *See Bundens v. J.E. Brenneman Co.*, 46 F.3d 292 (3d Cir. 1995). The court noted, however, that collateral estoppel would apply to bar a subsequent LHWCA claim if the claimant, instead of settling, had been adjudicated to be a seaman for purposes of his Jones Act claim. *Bundens*, 46 F.3d at 298 n.12.

L.Ed. 2d 405 (1991), that the mere receipt of LHWCA benefits without a formal compensation order does not in itself preclude seaman status. The Court stated in *Gizoni* that until a claimant's status is decided in one forum or another, he should not be forced to an "election of remedies." 502 U.S. at 92 n.5. The Court's concern was that if a claimant is forced to select one remedy scheme before his status is determined, he risks having no remedy. That is not the situation in Papai's case, or in any case in which either the court or the LHWCA forum has determined the claimant's status. Where status has been determined, the claimant has a remedy. The question in this case is whether he should have two.[15]

The phrase "election of remedies" has no clear legal meaning.[16] It is not a rule of substantive law, but one of procedure or judicial administration. Arising from principles of estoppel, it is meant in a general sense to prevent a party from asserting and recovering on two inconsistent procedures on the same set of facts. Like waiver and estoppel, the election of remedies doctrine constitutes an affirmative defense. 25 Am. Jur. 2d *Election of Remedies* §§ 1-6 (1996). The election of remedies defense, however, is separate and distinct from the doctrine of collateral estoppel.[17] HTB could have asserted three defenses against Papai's Jones Act claim following his LHWCA award: (1) § 905(a), (2) collateral estoppel, and (3) the affirmative defense of election of remedies. HTB has not asserted and does not assert the defense of election of remedies. The potential election of remedies defense is not controlling of or even relevant to HTB's defenses under § 905(a) and collateral estoppel.

[15] Since an LHWCA worker is in fact allowed two remedies—compensation benefits and a § 905(b) negligence action against the vessel—it is more accurate to say that Papai is seeking three remedies instead of two.

[16] "A confusing congeries of doctrines have been lumped together under the election of remedies label." 18 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4476, p. 772.

[17] 18 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4476, pp. 772-779.

Furthermore, the election of remedies doctrine does not allow a claimant two remedies when he is only entitled to one. Papai's argument about election of remedies ignores the fundamental distinction between the *Gizoni* case —in which the claimant was faced with the possibility of having no remedy—and this case, in which Papai has remedies. If this Court follows Papai's suggestion and refuses to give binding effect to the first status determination by a court or ALJ, that could result in an LHWCA forum determination that a claimant was a seaman (hence denying recovery) and a Jones Act forum determination that the claimant was not a seaman (hence denying recovery). Papai's election of remedies argument therefore could create the very problem that the Court in *Gizoni* tried to avoid.

Papai's argument on this point also ignores the practical consequences of allowing a second remedy: excessive and duplicative litigation. Allowing a second remedy obviously creates a powerful incentive for claimants to litigate the case twice. The burden on the courts and administrative tribunals would be significant and unavoidable.

5. *Enforcing The Statutory Scheme Is Fair.*

a. In the guise of arguing that he is being forced into an election of remedies, Papai actually is contending that he should be allowed two remedies instead of one. Papai asserts that this would be beneficial since he would not be deprived of the highest recovery that might be available to him. But this is a policy decision properly left to Congress, which enacted the Jones Act and the LHWCA as mutually exclusive, and which enacted § 905(a).[18] If maritime workers wish to be entitled to concurrent remedies—the right to pursue both LHWCA remedies and seaman remedies to conclusion, and to pick the higher re-

[18] The Supreme Court has recognized that the LHWCA "was not a simple remedial statute intended for the benefit of the workers," but was designed to strike a balance between the concerns of LHWCA workers and their employers. *Morrison-Knudsen Const. Co. v. Dir., Office of Wkrs. Comp. Prog.*, 461 U.S. 624, 635-6, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983).

covery—that desire should be addressed to Congress, not to this Court.

b. A claimant generally is able to ensure that his status will be determined in the forum of his choosing, for he controls the order of proceedings. If a claimant wishes his status to be determined by the court, he can sue under the Jones Act and defer his LHWCA claim. The LHWCA claim will not be time barred because the Act provides an extension of time to make a claim until the Jones Act suit is concluded. 33 U.S.C. § 913(d).

If a claimant wishes his status to be determined by the Department of Labor or an ALJ, he can pursue his LHWCA claim and defer his Jones Act suit for up to three years (the Jones Act time bar). 45 U.S.C. § 56. Three years is normally sufficient time for the LHWCA forum to determine his status, and if it takes longer, he can file his Jones Act suit and seek a stay pending determination of his LHWCA claim.

Papai argues that a claimant whose status is ambiguous (who may be either a Jones Act seaman or an LHWCA worker) may be forced to accept LHWCA benefits because of economic necessity, thereby foregoing his potential seaman remedies.[19] How often this really happens, the record does not show. This did not happen in Papai's case, since he received LHWCA compensation without an award for years, and simultaneously sought seaman remedies.[20]

[19] Papai's argument is premised upon the unsupported assumption that Jones Act awards generally are greater than LHWCA compensation benefits. Nothing in the record supports this, and the authorities Papai cites for the proposition make conjectural statements without any statistical support. While the potential remedy under the Jones Act may be larger because a seaman can recover for pain and suffering, that remedy is far less certain because (unlike under the LHWCA) a seaman must prove the employer's fault, and his recovery is reduced in proportion to his own negligence. Whether one remedy is more advantageous to a claimant than another will vary from case to case.

[20] Papai's brief states that he filed a claim for LHWCA benefits only after the District Court's ruling denying him seaman status. That is misleading. Papai was injured on March 13, 1989. Pursuant to 33 U.S.C. § 914, on March 30, 1989, HTB filed Form LS-206 with the Department of Labor, entitled "Payment of [LHWCA] Compensation Without Award," and began paying Papai LHWCA benefits. HTB made payments every two weeks thereafter until the ALJ hearing on June 2, 1992. Pet. App. 34a. Papai accepted all of these payments, both before and after he filed his Jones Act Complaint in January 1990, and before and after the District Court's initial ruling on his status on May 29, 1990. The payments were premised upon Papai's initial report of a left knee injury. On April 15, 1991, Papai filed a Form LS-203 with the Department of Labor, claiming that he had not only a knee injury, but also a back injury, which would yield a higher LHWCA award. On May 30, 1991, HTB filed Form LS-207, controverting this newly claimed back injury. This (not the status issue) is what triggered the necessity for an ALJ hearing.

Moreover, a claimant who is receiving LHWCA compensation can defeat or substantially delay the entry of a compensation order that would bar him from a Jones Act remedy. For instance, a compensation order under § 8(i) or by the District Director under 20 CFR § 702.315 requires the claimant's assent, which he can withhold. Similarly, a trial before an ALJ will not occur for months or years, and the claimant can withdraw his LHWCA claim before the trial begins.[21] Conversely, if for economic reasons the claimant requests a prompt decision on status, both the Department of Labor and the courts have the power and the procedural tools to make one.[22]

A claimant whose status is ambiguous and who for economic reasons decides to first seek LHWCA compensation rather than seaman remedies will not be disadvantaged. If the ALJ finds that he was an LHWCA worker and not a seaman when injured, the claimant loses nothing, since

[21] During this period the employer has an incentive to make LHWCA compensation payments even without a compensation order if the employer believes that the claimant is likely to be determined to be an LHWCA worker rather than a seaman. The payments are not truly voluntary; the employer is required to make the payments if he does not controvert the obligation to do so, failing which he is subject to penalties. 33 U.S.C. § 914(a) and (e); 20 CFR § 702.231-233.

[22] E.g., a court could sever the status issue and try it first, well before the normal trial date.

he would not be entitled to seaman remedies in the first place. If the ALJ finds that he was a seaman, then he is on his way toward the seaman remedies that he desires, and was not entitled to LHWCA compensation.[23]

Similarly, if the claimant believes that he is a seaman, and if to preserve his claim to that status he defers an LHWCA claim, that merely puts him into the same economic position as all other seamen under the Jones Act.[24]

Conversely, allowing a claimant the right to pursue to conclusion both LHWCA and Jones Act remedies would create a privileged class of workers, who will be entitled to receive LHWCA benefits and then sue under the Jones Act. Injured workers who are unambiguously seamen have no such advantage. As the Fifth Circuit Court of Appeals has stated, Congress did not intend the LHWCA to be a stepping stone on the way to a Jones Act jury award, or a safety net guaranteeing workers a minimum award as they seek greater rewards in court.[25]

c. Papai argues that allowing a preclusive effect to an ALJ decision on status would penalize employers who voluntarily pay LHWCA compensation while immunizing from seaman claims those who force an LHWCA adjudication. Giving preclusive effect to compensation orders under § 8(i) and 20 C.F.R. § 702.315 solves this problem when such orders are available, since in that case an employer can make LHWCA payments and still be protected against a Jones Act claim without forcing an unnecessary ALJ adjudication.[26]

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[23] If a claimant receives LHWCA compensation benefits without a compensation order, and then is found to be a seaman but fails to recover under the Jones Act (e.g., because the employer defendant was not at fault), the employer cannot recoup the LHWCA compensation paid to the claimant, even though (because he was a seaman) the claimant was not entitled to receive it. *Stevedoring Serv. of America, Inc. v. Eggert*, 953 F.2d 552 (9th Cir. 1992).

[24] Such a person is not without provisional remedies. Under both the LHWCA and the Jones Act, the employer must pay for the claimant's medical treatment. In addition, the claimant will receive either voluntary LHWCA benefits as an LHWCA worker or maintenance and unearned wages as a seaman. A seaman's maintenance rate is governed by union contract; Papai's maintenance rate was $22 per day. (J.A. 73.)

[25] *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132-3 (5th Cir. 1991); *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 425-7 (5th Cir. 1992).

Papai's argument in effect is that because some employers who make voluntary compensation payments would be subject to a subsequent Jones Act claim, *all* employers should be disadvantaged by making them all subject to a second Jones Act remedy. Employers certainly would prefer some protection against a second remedy, even if that protection would not always be available to them.

d. Papai argues that no harm arises in allowing a claimant two remedies because the employer is entitled to a credit, which prevents a double recovery by the claimant. Of course, this is not itself a reason for allowing two remedies. In any event, the credits do not cover all the damages that the employer may have to pay, do not cover attorney fees, and can allow a claimant to recover more in total than either remedy scheme separately allows.[27]

B. ALJ Awards Under The LHWCA Satisfy The Requirements Of Administrative Collateral Estoppel.

Even if the Court holds that § 905(a) does not per se preclude Papai's further claim to seaman remedies, then Papai should be precluded from those remedies on the basis of collateral estoppel.

1. *No Statutory Intent Precludes The Application Of Administrative Collateral Estoppel In This Case.*

Papai argues that it would be inappropriate to infer a Congressional intent that collateral estoppel applies to seaman status decisions. This argument unjustifiably reverses the legal presumption. The Court does not need to

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[26] Upon that basis, the Supreme Court rejected an argument similar to Papai's in *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 538, 103 S.Ct. 1991, 76 L.Ed.2d 120 (1983).

[27] See HTB's opening brief, pp. 28-30.

infer Congressional intent that collateral estoppel applies; that application is presumed.[28]

2. *LHWCA § 22 Does Not Preclude The Application Of Collateral Estoppel.*

LHWCA § 22 allows the district director[29] of the Department of Labor, on the ground of a "change in conditions" or because of a "mistake in the determination of fact" by him, to review a compensation case and issue a new compensation order within one year after an LHWCA claim has been rejected or the last payment of compensation has been made. (33 U.S.C. § 922.) The Solicitor General argues that therefore no ALJ order is "final" until the one year period has passed, so collateral estoppel does not apply. The point is not in issue in this case because: (a) the one year period has long since passed, and (b) § 22 applies only to determinations of fact by the district director, not to determinations by an ALJ. *Director, OWCP v. Jourdan*, 975 F.2d 1286 (7th Cir. 1992). Also, § 22 is irrelevant because collateral estoppel applies to a final decision of a lower court or administrative tribunal even though that decision could later be reversed on appeal,[30] or could later be modified or reversed upon the discovery of new information.[31]

3. *An Injured Claimant Has An Incentive To Successfully Litigate His Status Before An ALJ.*

Collateral estoppel does not apply to preclude a party from relitigating an issue if the party's incentive to vigorously litigate that position in the prior proceeding was

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[28] *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991).

[29] Formerly called the deputy commissioner.

[30] Both the Papai and UBCJ briefs note that pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel. Citing 1B James Wm. Moore, et al., *Moore's Federal Practice*, para. 0.416[3] (2d ed. 1985) pp. 521-522, and *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1983).

[31] See Fed. R. Civ. Proc. 60(b).

inadequate. Therefore, Papai argues, the employer should not be allowed to invoke collateral estoppel in a Jones Act suit if an ALJ has found the claimant to be an LHWCA worker.[32] It is the claimant, however, not the employer, who would seek to relitigate the status issue. The employer could invoke collateral estoppel in a Jones Act suit only if the claimant has won the status issue in the LHWCA forum. When a claimant seeks LHWCA compensation, he necessarily represents that he is a covered worker, i.e., not a seaman. The claimant has a strong incentive to win that issue because otherwise he cannot receive an award of LHWCA benefits.[33]

II. A CLAIMANT'S STATUS AS A SEAMAN SHOULD BE BASED UPON HIS CONNECTION TO THE VESSEL TO WHICH HE IS ASSIGNED WHEN INJURED OR, IN CERTAIN CIRCUMSTANCES, AN IDENTIFIABLE GROUP OF VESSELS BELONGING TO HIS EMPLOYER.

A. To Be Considered A Seaman, The Claimant Must Have A Connection To A Vessel That Is Substantial In Both Duration And Nature.

Under *Chandris*,[34] a prerequisite for seaman status is that the claimant have a connection to a vessel that is

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[32] Papai cites *Simms v. Valley Line Co.*, 709 F.2d 409 (5th Cir. 1983) for the proposition that a determination of LHWCA worker status does not bar a subsequent Jones Act claim. The *Simms* holding is inapplicable. The case was decided entirely upon the procedural issue that Simms had no standing to appeal. The court did not address § 905(a). The *Simms* court discussed in dicta and in footnotes whether collateral estoppel might apply to a seaman status claim in a Jones Act case following the grant of LHWCA benefits, but did not decide the issue. (709 F.2d at 412-413.)

[33] The Solicitor General was well aware of these litigation incentives when it took the position in *Gizoni* that collateral estoppel should apply to bar a subsequent Jones Act suit, contrary to its position in this case. See United States Supreme Court Official Transcript at 41-43, *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (No. 90-584).

[34] *Chandris, Inc. v. Latsis*, —— U.S. ——, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995).

substantial in both duration and nature. *Chandris* requires that determination of a claimant's seaman status should be based upon his job assignment when the injury occurs.[35]

Prevailing authority has been that the Fleet Seaman Doctrine applies under certain circumstances to allow consideration of the claimant's relationship to several or all of the employer's vessels. While *Chandris* did not directly address the Fleet Seaman Doctrine, *Chandris* favorably cited the Fifth Circuit statement of the Doctrine and adopted the language of its standard formulation.[36]

The Court of Appeals below greatly expanded the seaman status test by allowing consideration not only of the claimant's job assignment when injured, but also his past (and future) job assignments. The Court of Appeals decision was based upon a patent misreading of the *Chandris* decision.[37] Expanding the seaman status test in this way would make seaman status unpredictable and discretionary. It would undoubtedly generate significantly more litigation because a claimant who—based upon his job assignment when injured—is clearly a seaman or clearly an LHWCA worker would be able to seek a jury determination that prior or subsequent job assignments should control the status issue in his case.

The briefs for Papai barely address any of these points. They do not explain why a significant expansion of the right to seaman status is necessary, logical, or desirable, how such an expansion comports with *Chandris*, or how that expansion would avoid unpredictable status determinations and excessive litigation. On this subject, what those briefs do not say is more significant that what they do say.

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[35] 115 S.Ct. at 2191, 132 L.Ed.2d at 339-40.

[36] 115 S.Ct. at 2189-90, 132 L.Ed.2d at 336-7.

[37] See HTB's opening brief, pp. 37-38.

1. *For The Claimant To Be A Seaman, His Relationship To The Vessel Must Subject Him To Perils Of The Sea.*

Papai cites *Fisher v. Nichols*, 81 F.3d 319 (2d Cir. 1996), for the proposition that the Fleet Seaman Doctrine is too narrow. Fisher was injured during a sailing race while serving as a crewmember aboard an oceangoing sailboat for one day. He sued his employer (Nichols) under the Jones Act. The jury found him to be a seaman and granted him an award. On appeal, Nichols argued that Fisher was not a seaman. The Court of Appeals acknowledged that land-based employees who are injured while aboard ship do not qualify for Jones Act coverage. The court felt that if it could consider Fisher's status with regard only to his job aboard the sailboat, he did not have a connection with the vessel that was substantial in duration, because the job was for only one day. Believing that Fisher was "the type of person to whom the Jones Act was designed to give protection," however, and thus motivated to grant him seaman status, the court affirmed the award by also considering Fisher's regular employment as a seaman for other employers before the accident, rejecting the Fleet Seaman Doctrine adopted in the Third, Fifth, and Ninth (*pre-Papai*) Circuits.

Although the *Fisher* court stated that consideration of a claimant's prior work history in other job assignments is "consistent" with *Chandris* (81 F.3d at 323), clearly it is not. At most, the *Fisher* decision reinforces the split in the Circuits that *Papai* created as to the Fleet Seaman Doctrine. In addition, if the decision in *Fisher* is correct at all, it should have been decided upon different grounds. Fisher's entire job assignment on the day of the accident was to man the boat while it was at sea. That was sea-based work and, at least arguably, substantial in duration (100% of his time in that job assignment). The entirety of Fisher's one day job exposed him to the perils of the sea. For that reason, Fisher's status could properly have been left to the jury to decide.

Papai's case is different. The entirety of Papai's job was shore-based and did not expose him to the perils of the the sea. This is an important distinction. As this Court stated in *Chandris*:

> The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

Chandris, Inc. v. Latsis, —— U.S. ——, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314, 337 (1995).

In one sense, but not in the sense germane to seaman status, anyone standing on a floating boat is subject to "perils of the sea." A longshoreman—classically an LHWCA worker and not a seaman—typically boards a ship each day to load and discharge cargo, and he is subject to the perils of the vessel's sinking at the dock, or its surging and rolling due to wave action, passing ships, or high winds. These are the same perils that Papai faced, but they are not the type or magnitude of perils that a seaman faces when a ship is at sea, or that justify seaman status.

> Exposure to 'perils of the sea' and to risks attending the movement of vessels on navigable water are the distinguishing characteristics of a seaman's work . . . The sea is obviously a high risk workplace. So is a vessel in motion on navigable water, even though it may be within sight and hailing distance of land. Vessels in active operation are complex industrial enterprises presenting a range of hazards that differ significantly from those incident to work on land, piers, drydocks, and even vessels that are temporarily out of active marine operation while securely moored or anchored in protected inland water.

David W. Robertson, *A New Approach To Determining Seaman Status*, 64 Tex. L. Rev. 79, 80 (1985) (footnotes omitted).

Unlike Fisher, Papai was not subject to perils of the sea. Papai's status was not doubtful, and his status is not properly a question for a jury.

2. *That A Claimant Is Hired Out Of A Union Hiring Hall Is Irrelevant To His Status.*

Papai argues that employers who use a common union hiring hall should be considered a common employer for purposes of seaman status determinations. No precedent supports this position. In any event, the argument is misplaced. Under the test set forth in *Chandris*, a claimant's status is not determined by his prior jobs with his employer, let alone with a group of other employers, but by whether the claimant's job assignment when he is injured is shore-based or vessel-based.

Papai also argues that simply because he obtained employment through the union hiring hall, that should not be dispositive of his status. HTB agrees. If Papai had a sufficient connection to the Tug, he would be a seaman whether or not he obtained his job out of the union hiring hall.[88] His actual job, not whether he was hired out of a union hiring hall, determines his status.

B. The District Court Correctly Determined That Papai Did Not Have A Sufficiently Substantial Connection To The Tug To Be A Seaman.

Papai was the type of land-based maritime worker that the *Chandris* case (and indeed prior authority) excluded from seaman status. Papai's situation is akin to the hypothetical worker that the Court described in *Chandris* who was a seaman at one time but was transferred to shoreside duty and then injured. The Court stated no doubt that such a person was not a seaman. Similarly, whatever Papai's prior work may have been, the job during which

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[88] Longshoremen, quintessentially LHWCA workers and not seamen, also generally are hired daily out of union hiring halls.

he was injured was a discrete one day shore-based assignment. His prior work—whether for HTB or others—is irrelevant to his status that day.

Papai argues that he should be considered a seaman because his job title was "deckhand" and his union contract described some duties for its members that are operational seaman duties. The Supreme Court has long since decided, however, that a worker's actual job duties, not his job title or possible duties, govern his status. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 260, 60 S.Ct. 544, 84 L.Ed. 732 (1940) (confirming that claimant was not a seaman though his job title was "deckhand"); *cf. Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 87, 112 S.Ct. 486, 116 L.Ed. 2d 405 (1991) (stating that the claimant's actual work could make him a seaman even though his job title was one enumerated under the LHWCA).[39]

CONCLUSION

No reason exists to torture the meaning of § 905(a), ignore the principles of collateral estoppel, and greatly expand the seaman status test in order to allow a finding that Papai was a seaman. The Court of Appeals decision below should be reversed, and Papai should be precluded from further pursuing seaman remedies.

[39] Papai's brief asserts that the Port Captain (Papai's supervisor on the date of injury) was "not shoreside", but was in charge of the seagoing operation of the Tug. Although the Port Captain was administratively in charge, he worked in an office, not on the tugs. He was higher in authority than the captains of the tugs, but would rarely if ever himself operate a tugboat. (Clinton testimony, RT, Vol. 7, pp. 96-97 and Vol. 9, p. 37.)

Respectfully submitted,

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No. 95-1621

In the Supreme Court of the United States

OCTOBER TERM, 1996

HARBOR TUG AND BARGE COMPANY, PETITIONER

v.

JOHN PAPAI AND JOANNA PAPAI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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36 pp

QUESTIONS PRESENTED

The Jones Act, 46 U.S.C. App. 688, provides a "seaman" injured in the course of his employment with a negligence cause of action against his employer. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires employers to pay compensation and medical benefits to certain maritime workers injured in the course of their employment, but excludes from its scope "a master or member of a crew of any vessel," 33 U.S.C. 902(3)(G), a designation that has been held to be synonymous with a "seaman" under the Jones Act. The questions presented are:

1. Whether a determination in a compensation proceeding under the LHWCA that a worker was not a member of a crew precludes the worker from independently establishing his status as a seaman in a civil suit under the Jones Act.

2. Whether an employee who is hired on a daily basis through a multi-employer hiring hall to perform maritime work on a vessel has the requisite connection to an identifiable group of vessels to be considered a seaman subject to Jones Act coverage.

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INTEREST OF THE UNITED STATES

This case presents the question whether a determination by an administrative law judge that an injured worker is covered by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, precludes the worker from bringing an action against his employer under the Jones Act, 46 U.S.C. App. 688. The case also presents the question whether an employee who is hired on a daily basis through a multi-employer hiring hall to work on vessels has the requisite connection to an identifiable group of vessels to be considered a seaman subject to Jones Act coverage. The Secretary of Labor administers the LHWCA, 33 U.S.C. 939, and thus has an interest in whether LHWCA adjudications have a preclusive effect on Jones Act proceedings and whether

employees who staff vessels through multi-employer hiring halls are included in Jones Act coverage (and excluded from LHWCA coverage) as "member[s] of a crew." 33 U.S.C. 902(3)(G).

STATEMENT

1. The Jones Act provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury." 46 U.S.C. App. 688(a). The Act thus provides a worker who is a "seaman" with a negligence cause of action against his employer.

The LHWCA is a workers' compensation statute that applies to certain employees injured in the course of maritime employment "upon the navigable waters of the United States" and adjoining areas. 33 U.S.C. 903(a). Section 2(3)(G) of the LHWCA defines an "employee" covered by the Act as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, *but such term does not include* * * * *a master or member of a crew of any vessel.*

33 U.S.C. 902(3)(G) (emphasis added). A "master or member of a crew of any vessel" within the meaning of the LHWCA is synonymous with "seaman" under the Jones Act. See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 347 (1991).

2. Respondent John Papai[1] was injured while working as a deckhand on a tug operated by petitioner

[1] Joanna Papai, John's wife, is also a plaintiff in the action (and a respondent in this Court), seeking damages for loss of consortium, Pet. App. 3a; because her claims are derivative of her husband's, however, we use the term respondent in this brief in the singular to refer to John Papai.

Harbor Tug and Barge Company. Pet. App. 3a. Petitioner does not maintain a permanent crew for its own vessels. Instead, pursuant to a Deckhands Agreement with the Inland Boatman's Union (IBU or Union), it obtains necessary staff for its vessels from the Union's hiring hall. *Ibid.* On the day of his injury, respondent had been dispatched to work as a deckhand on a one-day assignment to the tug, under the supervision of petitioner's port captain. Respondent was assigned to paint the tug and was injured when he fell while climbing down a ladder. *Ibid.* Between 1987 and his injury on March 13, 1989, respondent had obtained maintenance, deckhand, and longshoring jobs through the IBU hiring hall with various participating employers. *Id.* at 36a-37a. Those jobs mostly lasted one day, sometimes two or three days, and occasionally longer. J.A. 29, 34. Between January 1, 1989, and the date of his injury, respondent worked 13 days for petitioner. Pet. App. 3a.

3. In January 1990, respondent filed this action against petitioner seeking damages under the Jones Act and for unseaworthiness under general maritime law. Pet. App. 3a. The district court granted petitioner's motion for summary judgment, ruling that respondent was not a "seaman" within the meaning of the Jones Act or under general maritime law. *Id.* at 23a. The court, however, provided respondent with an opportunity to amend his complaint. *Ibid.* Respondent thereupon filed an amended complaint in the district court under Section 5(b) of the LHWCA, 33 U.S.C. 905(b), seeking damages from petitioner as a

result of its alleged negligence as the owner/operator of the tug. Pet. App. 4a; J.A. 82. In addition, respondent filed a motion seeking reconsideration of the court's ruling on "seaman" status. The district court denied that motion, but certified its summary judgment ruling on the "seaman" issue for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 25a. The court of appeals denied respondent's petition for interlocutory appeal in October 1990. *Id.* at 4a.

4. After the district court's summary judgment ruling, respondent filed a claim for benefits under the LHWCA. Pet. App. 4a. The case proceeded to hearing before an administrative law judge (ALJ). *Id.* at 32a; 20 C.F.R. 702.252, 702.331-702.351.[2] Although petitioner had obtained summary judgment in the Jones Act proceeding on the ground that respondent was not a "seaman," it argued at the hearing that respondent "may have been a Jones Act seaman" at the time of his injury, and that, if so, he was excluded from the LHWCA as a "member of a crew of [a] vessel," 33 U.S.C. 902(3)(G). Pet. App. 34a-35a; see 20 C.F.R. 702.251.

In considering whether respondent came within the LHWCA exception for members of a crew of a vessel, the ALJ first considered whether to accord collateral estoppel effect to the district court's summary judgment ruling in the Jones Act proceeding that respondent was not a "seaman." The ALJ declined to do so, noting that the district court's ruling was interlocutory, in light of respondent's claim under 33 U.S.C.

[2] Although petitioner raised a question before the ALJ as to respondent's coverage under the LHWCA, it apparently paid respondent LHWCA benefits without a formal order from the time of his injury until the ALJ hearing. See Pet. App. 34a.

905(b), which was still awaiting resolution by the district court. Pet. App. 35a n.2. On the merits of the coverage issue, the ALJ concluded that respondent was covered by the LHWCA on the ground that he was a land-based employee without a permanent connection to a vessel, and therefore was not a "member of a crew" within the meaning of the LHWCA exclusion. *Id.* at 37a. After resolving other disputed issues, the ALJ awarded respondent benefits under the Act. *Id.* at 54a-55a. Because petitioner did not seek review of the compensation order, *id.* at 4a, that order became final 30 days after it was filed in the office of the deputy commissioner (now called district director, see 20 C.F.R. 701.301(a)(7)). 33 U.S.C. 921(a).

5. In the meantime, in August through September of 1992, the district court conducted a trial on respondent's claim against petitioner under 33 U.S.C. 905(b).[3] In December 1992, the district court ruled that respondent had not established negligence on the part of petitioner as operator of the tug, and it dismissed respondent's amended complaint. Pet. App. 28a-29a. Respondent appealed from that final order of the district court. *Id.* at 4a-5a.

[3] A few months before the trial, the district court entertained briefing on respondent's seaman status under the Jones Act, in light of the intervening decisions in *McDermott International, Inc.* v. *Wilander*, 498 U.S. 337 (1991), and *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81 (1991). The district court affirmed its earlier ruling that respondent was not a seaman, stating that respondent "did not have a 'more or less permanent connection' with the vessel on which he was injured nor did he perform substantial work on the vessel sufficient for seaman status." Pet. App. 27a (no citation for quotation in original).

6. The court of appeals reversed, holding that the district court improperly granted summary judgment on the Jones Act and unseaworthiness claims. Pet. App. 1a-19a. The court held that after this Court's decision in *Chandris, Inc.* v. *Latsis*, 115 S. Ct. 2172 (1995), the appropriate inquiry is not whether respondent had a permanent connection with a vessel, but whether respondent's "relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment." Pet. App. 7a. The court held that it may be necessary to examine the work performed by the employee while employed by different employers during the relevant time period. Such an examination was appropriate here, the court concluded, because a group of employers who join together to obtain a common labor pool from a union hiring hall is properly treated as a common employer; employees customarily performing work that would entitle them to seaman status should not, the court reasoned, be deprived of that status because the industry operates on a daily assignment system. *Id.* at 8a. Moreover, the court observed, respondent worked for petitioner on far more than one occasion and his work with petitioner alone may have provided a sufficient connection with petitioner's vessels to establish his status as a seaman. *Ibid.* In assessing respondent's status, therefore, the court ruled that all work performed by respondent as a deckhand must be considered, as well as work performed for other employers during the relevant time period. Accordingly, the court of appeals concluded that the district court had erred in granting summary judgment, "since issues of fact remained as to [respondent's] connection with the vessel." *Id.* at 9a.

The court of appeals also rejected petitioner's contention that the ALJ's award of LHWCA benefits to respondent precluded him from continuing to litigate his claim for Jones Act remedies. The court noted that, in *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81 (1991), this Court held that an employee who received payments voluntarily made by his employer under the LHWCA is not barred from prosecuting a Jones Act claim. Pet. App. 10a. While this case differs in that respondent received an adjudicated award of benefits, the court noted *Gizoni*'s emphasis that an employer will be credited for compensation previously paid, a factor that is equally applicable in the case of compensation paid pursuant to an adjudicated award. *Ibid.* (citing *Gizoni*, 502 U.S. at 91-92).

The court of appeals observed that the parties are on opposite sides of the seaman issue in the LHWCA adjudication as compared with their positions in the Jones Act suit. Pet. App. 11a. The court expressed concern about the "fairness in imposing * * * a bar [on independent resolution of the seaman question] where [the bar] could work [as] a disincentive on the part of the employer to vigorously litigate its defense in the LHWCA action." *Ibid.* The court also noted that a preclusion rule would subject to a Jones Act suit an employer who immediately and voluntarily begins compensation benefits, while immunizing from such a suit an employer who forces an employee to seek compensation through administrative adjudication. *Ibid.* The court concluded that, in those circumstances, a bar to relitigation "would not serve the purpose for which it is usually employed," and the court therefore extended the reasoning of *Gizoni* to its "next logical step" by holding that the LHWCA

determination by the ALJ did not bar respondent's Jones Act claim. *Id.* at 12a.

Judge Poole dissented on the question of whether respondent was a seaman. Pet. App. 13a-19a. He would have adopted the reasoning of the ALJ who decided respondent's LHWCA claim: that respondent's assignment to any particular vessel or fleet of vessels was "random, sporadic and transitory," and therefore lacking in the requisite connection to a vessel that would entitle him to seaman status. *Id.* at 18a (quoting *id.* at 37a).

SUMMARY OF ARGUMENT

I. Neither the doctrine of administrative collateral estoppel nor 33 U.S.C. 905(a)'s exclusivity provision precludes an independent determination in a Jones Act suit of whether the plaintiff is a "seaman," based on a prior determination of non-seaman status in an LHWCA proceeding. That conclusion is supported by the unique interplay between the two remedial schemes, the specific provision in the LHWCA to provide "credits" for recoveries under other remedial schemes, and the unfairness of applying estoppel and preclusion in this setting. If accepted, petitioner's position would force injured workers into an election of remedies, which Congress did not intend to impose in this remedial scheme. See, *e.g.*, *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 91-92 (1991).

II. The court below also properly determined that the jury should be given the opportunity to decide whether respondent was a "seaman" subject to Jones Act coverage under the test enunciated in *Chandris, Inc.* v. *Latsis*, 115 S. Ct. 2172, 2193-2194 (1995). That test consists of two elements: whether the worker "work[s] at sea in the service of the ship," *id.* at 2190;

and whether the worker's connection to the vessel is sufficiently substantial in duration and time to warrant Jones Act protection as a seaman, *ibid.* The test does not, as petitioner asserts (Br. 33), require "common ownership or control" of vessels as a prerequisite to establishing an identifiable "fleet" of vessels upon which a person may work. Rather, as in this case, employees hired through a union hiring hall may have a sufficiently substantial connection to an identifiable group of vessels to qualify for seaman status. Because reasonable persons might differ on that issue here, the jury should be permitted to evaluate the facts and determine whether respondent qualifies under the Jones Act as a seaman.

ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE'S AWARD OF BENEFITS TO RESPONDENT DOES NOT PRECLUDE THE DISTRICT COURT IN THIS JONES ACT SUIT FROM INDEPENDENTLY DETERMINING WHETHER RESPONDENT IS A "SEAMAN"

The court of appeals correctly held that respondent is not barred from establishing his status as a "seaman" in this suit under the Jones Act, 46 U.S.C. App. 688(a), by virtue of the determination by the administrative law judge (ALJ) in the proceeding under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, that respondent was not a "member of a crew," 33 U.S.C. 902(3)(G). Petitioner asserts that a contrary result is required by the "exclusivity" provision of Section 5(a) of the LHWCA, 33 U.S.C. 905(a), and the doctrine of administrative collateral estoppel. As petitioner acknowledges (Br. 19-20), its Section 5(a) argument is broader

than its collateral estoppel argument because the former would give preclusive effect to any formal award of benefits under the LHWCA, whether by adjudication or approved settlement, regardless of whether the coverage issue was actually litigated or expressly decided in the LHWCA proceeding. Petitioner's collateral estoppel argument would preclude Jones Act suits only when there has been actual litigation before the ALJ of the "member of a crew" issue. Pet. Br. 20. Both approaches purport to derive from the statutory language and purposes of the LHWCA. Because petitioner's broader preclusion argument rests on many of the same erroneous assumptions underlying its more limited collateral estoppel argument, we address estoppel first.

A. Respondent Is Not Collaterally Estopped From Asserting His "Seaman" Status Based On The ALJ's Ruling In The LHWCA Proceeding

Petitioner suggests (Pet. Br. 22) that the doctrine of administrative collateral estoppel should apply to bar consideration of the "seaman" status of the plaintiff in a Jones Act suit if the "formal award of LHWCA benefits (whether by an ALJ hearing or approval of a § 8(i) settlement)" results in LHWCA worker status being "expressly found." That contention lacks merit.

1. The principle of collateral estoppel generally applies to final determinations of an administrative body when it has acted in a judicial capacity and decided "issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107 (1991). Because Congress is understood to legislate against a background of common law adjudicatory

principles, Congress is presumed to expect that such estoppel will apply unless a statutory purpose to the contrary is evident. *Id.* at 108. The presumption in favor of administrative collateral estoppel, however, is "lenient," *id.* at 112, applying only where Congress has failed "expressly or impliedly" to evince any intention on the issue, *id.* at 110. Moreover, the doctrine's "suitability may vary," according to various factors, including "the specific context of the rights at stake." *Ibid.*; see also Restatement (Second) of Judgments § 28(5)(c), at 273-274 (1982) (issue preclusion is inappropriate where the party to be precluded did not have an adequate incentive in the initial action to litigate vigorously his present position).

2. a. The specific context of the rights at stake in this case—the unique interplay between the LHWCA and the Jones Act—makes it highly unlikely that Congress intended a categorical rule that would give collateral estoppel effect to an administrative finding of LHWCA coverage, thereby foreclosing an independent determination by the jury in the Jones Act suit that the injured maritime worker was actually a Jones Act seaman.

This Court has established that the two statutes are mutually exclusive in the sense that a "member of a crew," as excluded from LHWCA coverage by 33 U.S.C. 902(3)(G), is synonymous with a "seaman," who is covered under the Jones Act, 46 U.S.C. App. 688(a). See *Chandris, Inc.* v. *Latsis*, 115 S. Ct. 2172, 2183-2184 (1995); *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 347 (1991). Notwithstanding that recognition of the mutual exclusivity of the two Acts, however, the line of demarcation between them is often unclear, and there is, "in a practical sense, a 'zone of uncertainty' inevitably connect[ing] the two Acts."

Simms v. *Valley Line Co.*, 709 F.2d 409, 411 (5th Cir. 1983) (quoting *McDermott, Inc.* v. *Boudreaux*, 679 F.2d 452, 459 (5th Cir. 1982)); see also *Chandris*, 115 S. Ct. at 2184. That confusion is compounded by the rule that "the LHWCA and its exclusionary provision do not apply to a harbor worker who [although within an enumerated LHWCA occupation] is *also* a 'member of a crew of any vessel,' a phrase that is a 'refinement' of the term 'seaman' in the Jones Act." *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 87 (1991) (quoting *Wilander*, 498 U.S. at 347) (emphasis added). Given the historical uncertainty between the two remedial schemes for maritime workers, it would be inappropriate to infer a congressional intent that a determination by an ALJ under the LHWCA must be given collateral estoppel effect in a Jones Act suit.

b. The text of the LHWCA supports the view that Congress did not intend for categorical rules of estoppel to apply in this context. Cf. *Astoria Federal*, 501 U.S. at 110 (administrative collateral estoppel inappropriate when the federal statute "carries an implication" against preclusion). As this Court pointed out in *Gizoni*, Section 3(e) of the LHWCA, 33 U.S.C. 903(e), demonstrates that "the LHWCA clearly does not comprehend such a preclusive effect." 502 U.S. at 91. Section 3(e) provides that any amounts paid to an employee "pursuant to * * * section 688 of title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed" under the LHWCA. That provision of the LHWCA clearly contemplates that, notwithstanding the mutual exclusivity of the two schemes, an employer may have incurred concurrent liability under

the Jones Act and the LHWCA.[4] The credit provision of the LHWCA, and a similar credit doctrine developed under the Jones Act (see Pet. Br. 29), provide a practical solution to any problems of inconsistent adjudications: they in large measure eliminate double recovery by the employee. Moreover, those crediting arrangements underscore that the LHWCA does not give "primary jurisdiction" to the administrative scheme. See *Gizoni*, 502 U.S. at 90-91.

The collateral estoppel rule petitioner urges is further undermined by Section 22 of the LHWCA, 33 U.S.C. 922, which permits the deputy commissioner, "[u]pon his own initiative, or upon the application of any party in interest * * *, on the ground of a change in conditions or because of a mistake in a determination of fact," to issue a new order terminating, continuing, or modifying a compensation award, within one year of a denial of an award or within one year of the last payment of compensation if an award was made. This Court has held that the authority to reopen a decision under Section 22 is not limited to cases involving new evidence or changed circumstances, but rather vests broad discretion in the deputy commissioner to correct mistakes of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the

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[4] Section 3(e) of the LHWCA, 33 U.S.C. 903 (e), states:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under [the LHWCA] pursuant to any other workers' compensation law or [the Jones Act] (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by [the LHWCA].

evidence initially submitted." *O'Keefe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255, 256 (1971) (per curiam); see also *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2146 (1995). Administrative decisions awarding or denying compensation under the LHWCA therefore are not accorded the sort of finality under the LHWCA itself that could, in turn, furnish a basis for imposing issue preclusion outside that special statutory scheme—in tort suits in federal district court under the Jones Act.

c. Because of the uncertainties of coverage under the two remedial schemes, it is not at all surprising that employees routinely pursue concurrently both an LHWCA compensation claim and a Jones Act tort claim. Nor, given the existence of the credit doctrines' protection to the employer against an unfair double recovery by the worker, is it unfair that they do so. By permitting parallel proceedings, Congress can be presumed to have anticipated that claimants would be put in the position of arguing for crew-member status in the Jones Act proceeding and for non-crew-member status in the LHWCA proceeding, and that the employer could be expected to defend with inconsistent positions on coverage as well. Congress can also be presumed to have been aware that, because in each case the parties must weigh the likelihood of a potentially larger recovery under the Jones Act against the generally greater certainty of a smaller, no-fault compensation order under the LHWCA, both sides do not always have an incentive to litigate the coverage issue fully and with equal vigor.

The lack of incentive to litigate coverage as aggressively as possible is most likely to occur when the employer, although contesting LHWCA coverage,

would nonetheless actually prefer LHWCA liability to Jones Act liability; in that situation, the employee may well, by contrast, actually prefer the prospect of recovery under the Jones Act, rather than the LHWCA, even though he has filed a claim under the LHWCA. Neither party can be assumed to have a real incentive to litigate vigorously a position that is the reverse of that party's position in the Jones Act proceeding. Under widely recognized principles of issue preclusion, a party is not precluded from relitigating the same position it lost in a prior proceeding if the party's incentive to litigate vigorously that position in the initial action was inadequate. See Restatement (Second) of Judgments § 28(5)(c) (1982). *A fortiori*, a party should not be precluded from litigating a position where, as here, he did not espouse that position in the earlier proceeding. Indeed, the position that petitioner seeks to preclude respondent from advancing (*i.e.*, that respondent was a seaman) appears to have been merely suggested to the ALJ by petitioner, who of course is now arguing for the opposite result in the Jones Act suit. See Pet. App. 35a (noting that petitioner argued that "claimant may have been a Jones Act seaman").

This case thus vividly illustrates why the application of collateral estoppel principles in the Jones Act/LHWCA context would be problematic. Here, respondent filed his Jones Act suit first and was met with petitioner's defense that he was not a "seaman." The district court granted summary judgment in favor of petitioner on that issue, but the court of appeals denied respondent's petition for an interlocutory appeal. It was only at that point that respondent in fact filed an LHWCA claim. See Pet. App. 4a. At that point, it was to be expected that petitioner would

accede to LHWCA coverage, considering its position in the Jones Act proceeding and its payment of LHWCA benefits from the time of injury. Instead, it raised the coverage issue with the suggestion that respondent may not have been a covered employee under the LHWCA after all. If preclusive effect is accorded in the continuing Jones Act case to the ALJ's non-crew-member finding, petitioner will have effectively forced respondent to a disadvantageous election of remedies.[5] Thus, the court of appeals was correct to view adoption of a no-preclusion rule in those circumstances as merely "extending the reasoning of the *Gizoni* Court to the next logical step." Pet. App. 12a.[6]

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[5] The limitations period for the filing of an LHWCA claim is tolled during the pendency of a Jones Act suit that is unsuccessful because the plaintiff lacks seaman status. 33 U.S.C. 913(d). As a practical matter, however, it may be exceedingly difficult for an injured worker to refrain from filing an LHWCA claim, particularly where the employer's position in Jones Act litigation leads the worker to believe that he or she would receive benefits under the LHWCA. G. Gilmore & C. Black, *The Law of Admiralty* 435 (2d ed. 1975) (arguing against preclusion and asking: "How is an injured worker, who is arguably a Jones Act seaman, supposed to live and support his family during the months or years which will elapse before his damage recovery, if his Jones Act action is successful, becomes collectible?").

[6] In our *Gizoni* brief, we expressed the view, in support of the argument that acceptance of voluntary LHWCA payments does not preclude subsequent litigation of a Jones Act claim, that "[u]nder established principles of issue preclusion, only an adjudication under the LHWCA that an employee is not a crew member precludes litigation of a Jones Act claim." Brief for the United States as Amicus Curiae Supporting Respondent at 23 (No. 90-584) [filed May 15, 1991]. We indicated that such an adjudication must "satisf[y] the prerequisites for issue preclusion" to have that effect, without elaborating on what those prerequisites are or when they are deemed satisfied. *Id.* at 25. As explained above, we believe that each party's conflicting incentives in the LHWCA and Jones Act proceedings indicate that an important prerequisite for the application of issue preclusion—an adequate incentive to litigate—is absent, both in this case and more generally. For that reason, and in view of the offset and other features of the LHWCA and the other reasons set forth in the text, it is our more fully considered view that issue preclusion should not, as a general rule, be applied in this setting. Compare *Astoria Federal*, 501 U.S. at 114 (noting advantages of general rule of non-preclusion over case-by-case determination of adequacy of prior opportunity to litigate in administrative forum).

3. a. The election-of-remedies defect in petitioner's position is not limited to the sequence of events in this case alone. To apply collateral estoppel in this context would force injured workers as a general matter into an election of remedies that Congress did not intend. *Gizoni*, 502 U.S. at 92 n.5. If the first tribunal to determine the injured worker's status has preclusive effect on the other, as petitioner posits (Br. 8, 26), then the claimant must choose whether to pursue the more certain, but lower LHWCA benefits over the potentially far greater, but less certain Jones Act recovery. As this Court has recognized on numerous occasions, Congress did not intend in the LHWCA to force injured workers into an election of remedies. See, *e.g.*, *Gizoni*, 502 U.S. at 92 n.5; *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 722 (1980).[7]

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[7] Congress expressed its disapproval of election of remedies in a similar context in 1959, when it deleted an LHWCA requirement that an injured worker make an election between compensation under the LHWCA and the right to bring an action against a third party (the right to bring such an action was automatically assigned to the employer if the compensation was paid under a formal award). See generally *Pallas Ship-*

b. In addition, as the court of appeals noted (Pet. App. 11a), according preclusive effect to an administrative adjudication under the LHWCA that a claimant was not a member of a crew would leave employers who immediately and voluntarily begin compensation payments subject to a Jones Act suit under this Court's ruling in *Gizoni*, while immunizing those who resist an employee's LHWCA claim and succeed in forcing adjudication of the issue. In order to ensure prompt payment of benefits to injured workers, the LHWCA imposes stringent penalties on an employer who fails to pay benefits to an injured worker without filing a notice stating the grounds upon which the employer contends the employee is not entitled to benefits. 33 U.S.C. 914(d) and (e). If petitioner prevails in this case, payment will frequently be delayed to an employee who is on the border between Jones Act and LHWCA coverage. An employer will have a strong incentive to controvert the employee's LHWCA claim, rather than pay voluntary benefits, even if it believes the injured worker to be entitled to such a remedy.

Creating such a disincentive to voluntary payment would impair a central purpose of the LHWCA, which is to foster prompt payment of compensation and medical benefits to injured workers. See 33 U.S.C. 914(a); H.R. Rep. No. 1767, 69th Cong., 2d Sess. 19-20 (1927). Such a ruling would also deny a worker injured in circumstances that might give rise to Jones

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ping Agency, Ltd. v. *Duris*, 461 U.S. 529, 537 (1983). Congress deleted that requirement when it became apparent that injured workers were often compelled, as a practical matter, to take compensation in order to meet their living expenses, and therefore to relinquish their third-party tort actions. *Ibid.*; *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 80 (1980).

Act coverage the statutory right to a jury trial of the issue of whether he is, in fact, a seaman. Invoking collateral estoppel, and encouraging employers to controvert claims for the sole purpose of cutting off the claimant's possibly meritorious Jones Act litigation, thus introduces distortions into the system for compensating injured maritime workers and impedes the purposes of both statutes.

B. The LHWCA "Exclusivity Clause" Does Not Require That The ALJ Decision Be Treated As A Bar To Respondent's Jones Act Claim

We have argued above that Congress did not intend for LHWCA determinations to be given collateral estoppel effect in Jones Act suits. It follows that petitioner's broader argument—that *any* formal LHWCA award (whether litigated or not) precludes a Jones Act suit—must also fail. Nowhere in the LHWCA or the Jones Act has Congress provided for the determinations in proceedings under one Act to be given preclusive effect in proceedings under the other. Petitioner bases its argument for the preclusive effect of determinations in LHWCA proceedings on a provision which states that "[t]he liability * * * prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee * * * and anyone * * * entitled to recover damages from such employer at law or in admiralty on account of such injury," so long as the employer has complied with the Act's approved insurance requirement. 33 U.S.C. 905(a). Petitioner contends (Br. 19-20) that, by virtue of this "exclusivity" provision, a formal award of benefits under the LHWCA "per se preclude[s] further seaman remedies." That argument is based on a

fundamental misunderstanding of the function of the exclusivity provision.

1. The exclusivity of the LHWCA as the sole federal statute under which an employer may be held liable for compensating covered workers for their work-related injuries is not in question; rather, the issue is whether an inference should be drawn from that provision that a coverage determination in an LHWCA adjudication must be given preclusive effect. Section 5(a) of the LHWCA, 33 U.S.C. 905(a), establishes that if an injury or death is covered by the LHWCA, then the insured employer cannot be held liable for the injury or death under the Jones Act, general maritime law, or state common law, because the employer's liability under the LHWCA "shall be exclusive" of actions in tort, at law or in admiralty (except the rights preserved in Section 5(b) of the LHWCA, 33 U.S.C. 905(b)). Section 5(a) does not by its terms foreclose the basic coverage question from also being decided in the context of the issues raised in the non-LHWCA action. Thus, the insured employer may interpose an affirmative defense of coverage under the LHWCA as a predicate for dismissal of a tort action brought under a remedial scheme other than the LHWCA.[8] Cf. 2A A. Larson & L. Larson,

[8] The role of Section 5(a) is diminished in Jones Act suits because a plaintiff must establish his "seaman" status as part of his affirmative case, a showing that also affirmatively establishes that he is excluded from the LHWCA as a "member of a crew." Thus, because the exclusivity of the schemes is implemented by their coverage criteria, a Jones Act defendant has no need for an affirmative defense based on LHWCA coverage. That is not true, however, of an LHWCA employer who is a defendant in a common law tort or general maritime action brought by a putative LHWCA employee.

The Law of Workmens' Compensation § 65.12 (1996) (characterizing exclusivity clauses of workers' compensation statutes as creating affirmative defenses to tort actions). But Section 5(a) provides no textual support for petitioner's contention that a court entertaining the plaintiff's tort action may not independently determine whether the defendant is an "employer" subject to liability as "prescribed in section 904" of the LHWCA for the pertinent injury and, instead, must be bound by a prior determination on that question by an LHWCA adjudicator.[9]

2. Congress did not intend for the exclusivity of employer liability under the LHWCA to be absolute, as other LHWCA provisions make clear. The Act nullifies exclusivity when an employer fails to "secure the payment of compensation," that is, by failing to obtain insurance or to receive authorization from the Secretary to pay such compensation directly. See

[9] The LHWCA differs from the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, which not only contains an "exclusive remedy" provision, 5 U.S.C. 8116(c), but also provides that the action of the Secretary of Labor in allowing or denying payment under FECA is "final and conclusive for all purposes and with respect to all questions of law and fact," and shall not be subject to judicial review, see 5 U.S.C. 8128(b)(1) and (2). Accordingly, where there is a substantial question of FECA coverage, courts will stay or dismiss actions under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, until the Department of Labor determines whether FECA applies. See, *e.g.*, *DiPippa* v. *United States*, 687 F.2d 14, 20 (3d Cir. 1982). The LHWCA, by contrast, contains no provision declaring the Secretary's decision awarding or denying LWHCA benefits "final and conclusive" for "all purposes" and with respect to "all questions of law or fact," and it provides for, rather than forecloses, judicial review. See 33 U.S.C. 921(c); *Gizoni*, 502 U.S. at 90-91.

33 U.S.C. 904, 932(a) and (b). In addition, the Act authorizes negligence actions by LHWCA-covered employees (except those employed to provide shipbuilding, repairing, or breaking services) against employers as owners and operators of a vessel. 33 U.S.C. 905(b). Given those explicit textual limitations on the scope of Section 5(a), it would be anomalous to construe it broadly to encompass preclusive effects not enumerated by Congress. The credit provision of Section 3(e), discussed at pp. 12-13, *supra*, further supports the conclusion that Section 5(a) should not be read expansively to preclude pursuit of other remedies. See also *Sun Ship*, 447 U.S. at 722 (declining to "construe § 905(a) to exclude remedies offered by other jurisdictions" and holding that claimants may in some circumstances obtain awards under both a state workers' compensation scheme and the LHWCA).

3. Petitioner's theory also runs directly counter to this Court's decision in *Gizoni*, which specifically rejected the argument that Section 5(a) precluded a claimant from bringing a Jones Act suit after having voluntarily received LHWCA benefits. 502 U.S. at 91-92 & n.5. Although the exclusivity provision implements the quid pro quo underlying workers' compensation schemes, in which the employer assumes liability without fault in exchange for relief from potentially larger damage verdicts, *Gizoni* makes clear that LHWCA "exclusivity" imposes no election of remedies on employees.

Petitioner acknowledges (Br. 16) *Gizoni*'s holding, but contends nonetheless that the Court's reasoning does not extend to a "formal award," even if that

award is based on a settlement of the claim.[10] Section 5(a), however, does not distinguish between payments made without an award and formal awards, or between settlements and adjudications; it speaks only in terms of an employer's "liability." 33 U.S.C. 905(a). Consequently, there is no textual support for petitioner's attempt to limit *Gizoni*'s holding that Section 5(a) does not mandate issue preclusion in a Jones Act suit.

Moreover, the reasons given by *Gizoni* for permitting a claimant to proceed notwithstanding his acceptance of voluntary payments undermine petitioner's broad theory of LHWCA exclusivity. *Gizoni* emphasized the ability to credit employers under the LHWCA for amounts previously paid. See 33 U.S.C. 903(e). That provision protects employers against having to pay twice under different remedial schemes for the same injury.[11] Although the Court noted that the question of coverage is not actually litigated when payments are made voluntarily, its re-

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[10] Settlements under the LHWCA must be approved by a district director of the Office of Workers' Compensation Programs (OWCP) or by an ALJ. See 33 U.S.C. 908(i)(1). Such an approved settlement is considered a formal award because it is embodied in a compensation order. See, *e.g.*, *Reid* v. *Universal Maritime Serv. Corp.*, 41 F.3d 200, 201 (4th Cir. 1994). There is no requirement that parties, when obtaining approval for the agreement, establish that the claimant is an "employee" within the meaning of Section 2(3) of the LHWCA, 33 U.S.C. 902(3). See 20 C.F.R. 702.242 (information necessary for a complete settlement application).

[11] In discussing this credit provision, the Court in *Gizoni* (502 U.S. at 91-92) also relied on G. Gilmore & C. Black, *The Law of Admiralty* 435 (2d ed. 1975), for the accepted view that "the compensation payments [made under the LHWCA] will be routinely deducted from [a] damage recovery" under the Jones Act.

liance on the credit provision as a statutorily recognized equitable counter-balance to the absence of an election-of-remedies requirement applies equally to a formal award under the LHWCA. See *ibid.* (emphasis added) ("amounts paid * * * shall be credited against *any liability* imposed by [the LHWCA]"). The Court also emphasized that the question of coverage is not actually litigated when payments are made voluntarily. That ground for inapplicability of exclusion principles also fully applies to virtually any settlement approved under Section 8(i) and to formal adjudications when the issue of whether the claimant meets the criteria for LHWCA coverage is not litigated. Thus, petitioner's broad interpretation of Section 5(a), under which a formal LHWCA award of any sort precludes a Jones Act action, is difficult to square with the reasoning of *Gizoni*. See *Figueroa* v. *Campbell Indus.*, 45 F.3d 311 (9th Cir. 1995) (declining, based on *Gizoni*, to accord preclusive effect to LHWCA compensation award embodying settlement); but see *Sharp* v. *Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992), cert. denied, 508 U.S. 907 (1993).

II. RESPONDENT'S SEAMAN STATUS IS A MIXED QUESTION OF LAW AND FACT THAT SHOULD NOT BE KEPT FROM A JURY JUST BECAUSE PETITIONER EMPLOYED HIM ON A DAILY BASIS FROM A UNION HIRING HALL

The court below correctly decided that the district court should not have granted summary judgment on the issue of the employee's seaman status, and properly remanded for further proceedings. In defining the prerequisites for Jones Act coverage, this Court has, in its recent cases, "eschew[ed] the temptation to

create detailed tests to effectuate the congressional purpose" of distinguishing between sea-based and land-based maritime employees. *Chandris*, 115 S. Ct. at 2190. It has instead recognized that seaman status is a mixed question of law and fact in which "it is the court's duty to define the appropriate standard," but "[i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury." *Ibid.* (quoting *Wilander*, 498 U.S. at 356).

The proper legal standard has two parts: "First, * * * 'an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission."' * * * Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Chandris*, 115 S. Ct. at 2190 (citation omitted). The first requirement encompasses "'[a]ll who work at sea in the service of a ship' [and are therefore] *eligible* for seaman status." *Ibid.* (citation omitted). The second requirement aims fundamentally "to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from the land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Ibid.*

This case concerns the second of the foregoing requirements—whether respondent had the requisite connection to a vessel or "identifiable group of such vessels." In our view, "reasonable persons, applying the proper legal standard, could differ as to whether" respondent met that requirement, considering that he

had for some time worked on vessels in navigation as a deckhand or in ship maintenance (*e.g.*, painting) and, indeed, had performed considerable work for the same employer during the two months before the injury. *Chandris*, 115 S. Ct. at 2190 (citation omitted). This is not a case, for instance, in which the worker "ha[d] a clearly inadequate temporal connection to vessels in navigation," permitting the court to grant summary judgment for the employer. *Id.* at 2191; see *ibid.* ("A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land-based and therefore not a member of the vessel's crew, regardless of what his duties are."). Rather, during "the period covered by [respondent's asserted] maritime employment," his connection to vessels was arguably "substantial in both duration and nature." *Ibid.*

The court of appeals held that, in applying that requirement, employers who join together to obtain a common labor pool through a union hiring hall may be considered a common employer. Pet. App. 8a. Hence, the vessels owned or operated by such employers and staffed through the union hiring hall could be an identifiable group of vessels for purposes of the seaman test. In our view, the court's pragmatic and reasonable approach properly takes into account the realities of the employment system in which respondent worked. Cf. *Imel* v. *Laborers Pension Trust Fund*, 904 F.2d 1327, 1333 (9th Cir.) (contractors who use union hiring hall are appropriately considered single "employing unit" for purposes of rights guaranteed to returning servicemembers by the Veterans Reemployment Rights Act), cert. denied, 498 U.S. 939 (1990); see generally D. Robertson, *The Law of Seaman Status Clarified*, 23 J. Mar. L. & Com. 1, 27

(1992) (suggesting that seaman status be gauged by the traditional dangers attendant to work on moving vessels and to facing the perils of the sea). Indeed, if such a pragmatic analysis is discarded, it would lead to the conclusion that petitioner operates its boats without *any* seamen, since it does not hire any "permanent" crew and relies instead on hiring hall referrals. See Pet. App. 3a.

Petitioner correctly observes (Br. 33-34) that some courts of appeals have required "common ownership or control" of vessels as a prerequisite of an "identifiable fleet." But see *Fisher* v. *Nichols*, 81 F.3d 319, 323 (2d Cir. 1996) ("We do not read *Chandris* as requiring that * * * a Jones Act plaintiff must necessarily have a substantial connection to a particular vessel owned by that employer or to a group of vessels under common ownership or control of that employer."). There is, however, no inherent reason to define the requisite connection of the maritime worker to an "identifiable group" of vessels in navigation—the so-called "fleet doctrine"—solely in terms of the property relationship between the vessels and their owner or owners. Cf. *Bertrand* v. *International Mooring & Marine, Inc.*, 700 F.2d 240, 245 (5th Cir. 1983) (common ownership or control not required where its absence is "determined by the employer, not the nature of the claimants' work"), cert. denied, 464 U.S. 1069 (1984).[12] In this case, the employee had for some time

[12] The ownership of a vessel is not always readily known or apparent. The possibility of joint ownership renders ownership a particularly poor proxy for determining the seaman status of an employee. For instance, if an employee works on two vessels, one owned by A + B, and the other owned by A + C, would that arrangement satisfy a common ownership test for purposes of Jones Act coverage? And, if so, would the employee

worked for an identifiable group of vessels; the fact that he was a casual worker, hired on a daily basis through a union hiring hall acting as an employment agency for a number of sea-based employers, should not be dispositive in determining whether he was a crew member entitled to Jones Act protection.

Employees who have been referred through a union hiring hall to work on a vessel are like their counterparts who may have been hired on a more permanent basis by a single employer, but who also commute daily to and from their work on vessels tied up in dock or return to port each night after plying the inland harbors or coastal waters; they fall somewhere in the middle of the "spectrum ranging from the blue-water seaman to the land-based longshoreman." *Chandris*, 115 S. Ct. at 2184 (citation omitted). Cf. *id.* at 2188 (describing *Gizoni* as holding that Jones Act may be available to ship repairman employed by shipyard who spends portion of time working on shore but rest of time at sea). Where reasonable persons might differ, the status of such a worker as a seaman should properly be decided by a jury based on its assessment of the substantiality of the claimant's connection with the group of vessels. See *id.* at 2190.

In any event, the cases upon which petitioner relies (Br. 34) do not expressly consider whether an identifiable group of vessels could be defined by a hiring hall employment system, such as the one utilized by petitioner. Moreover, petitioner incorrectly asserts (Br.

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lose seaman status if he or she then also works on a third vessel owned by B + C, or by B alone? Or, to give another example, if two vessels are both owned by A, does an employee who has worked on those vessels lose seaman status if A sells one of the vessels to B?

37) that the court of appeals' decision in this case allows consideration of a "claimant's work history with all his employers"; the court's reference to "work performed for other employers," Pet. App. 8a, in context, refers to employers making use of the union hiring hall.

For much the same reason, the lower court's ruling is entirely consistent with *Chandris*'s recognition that, "[w]hen a maritime worker's basic assignment changes, his seaman status may change as well." 115 S. Ct. at 2191. The court of appeals' analysis properly rejects the notion that, in the employment system in which respondent worked, each referral from the hiring hall must be considered a discrete assignment that interrupts the worker's tenure as a seaman. Rather, if the worker shows a consistent pattern of hiring hall referrals to seaman duties, a jury should have the discretion to conclude that the worker demonstrates a "regular and continuous, rather than intermittent, commitment of [his] labor to the function" of the vessels of participating employers. *Ibid.*

The court of appeals thus correctly remanded for further consideration of respondent's status as a seaman, rather than affirming the summary judgment in favor of petitioner on that issue. Because ownership status is not dispositive of "the ultimate inquiry [of] whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time," *Chandris*, 115 S. Ct. at 2191, this Court should reject the proposition that employees on vessels who hire themselves out through hiring halls cannot, as a matter of law, be "member[s] of a crew," no matter the nature or duration of their work on one or more vessels or their exposure to the perils of the sea.

A rule foreclosing coverage in such circumstances would frustrate the purposes of the Jones Act because it would permit employers to structure their assignment practices so that their vessels have no "permanent" crew, and therefore no seamen. That sort of evasion of Jones Act coverage through "arrangements with third parties regarding the vessel's operation or * * * the manner in which work is assigned," *Bertrand*, 700 F.2d at 245, should not be permitted. Accordingly, the Court should not add a "common ownership or control" requirement to the two-part test for seaman status that it recently articulated in *Chandris*.[13]

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[13] The court below alternatively held that the employee's work for petitioner alone—which it described as "far more than a single occasion," "a dozen occasions over the two and a half month period," and "a substantial period of time"—"may in itself provide a sufficient connection" to permit a finding of seaman status. Pet. App. 8a & n.3. We agree that the facts of this case warrant submission of that issue of respondent's status to the jury as well. Thus, the court of appeals' decision should be affirmed even if this Court were to conclude that only evidence pertaining to respondent's work on petitioner's vessels should be considered.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1996

No. 95-1621

In The

Supreme Court of the United States

October Term, 1996

HARBOR TUG AND BARGE COMPANY, INC.,

Petitioner,

v.

JOHN PAPAI AND JOANNA PAPAI,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF INDUSTRIAL INDEMNITY COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, EAGLE PACIFIC INSURANCE COMPANY, MATSON NAVIGATION COMPANY AND THE LONGSHORE CLAIMS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

A. Papai Denied Seaman's Status in his LHWCA Claim, While Harbor Tug Asserted It. After Full Litigation, an ALJ Found Papai Was Not a Seaman, and Awarded LHWCA Benefits. Can Papai Now Relitigate that Same Issue in a Civil Court to Obtain a Different Result?

B. Can the Trier of Fact Consider Work for Different Prior Employers When Determining an Employee's Status as a Seaman with his Current Employer?

PARTIES TO THE ACTION

Plaintiffs/Respondents:

John Papai and Joanna Papai

Defendant/Petitioner:

Harbor Tug and Barge Company

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BRIEF OF INDUSTRIAL INDEMNITY COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, EAGLE PACIFIC INSURANCE COMPANY, MATSON NAVIGATION COMPANY AND THE LONGSHORE CLAIMS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

I. INTEREST OF THE AMICI CURIAE

Industrial Indemnity Company, National Union Fire Insurance Company of Pittsburgh, PA, Eagle Pacific Insurance Company, Matson Navigation Company and the Longshore Claims Association respectfully submit this brief *amici curiae* in support of the petitioner Harbor Tug and Barge Co. The consent of the attorneys for petitioner and respondent has been obtained.

Industrial Indemnity Company, National Union Fire Insurance Company of Pittsburgh, PA and Eagle Pacific Insurance Company are major underwriters of employer risk insurance, nationally and in West Coast markets. Among other things, they insure employers for United States Longshore and Harbor Workers' Compensation Act risks, and the various employer risks attendant to the Jones Act and the general maritime law of the United States. These insurance underwriters have a strong interest in promoting the swift, fair, and consistent resolution of employee claims brought against their insured employers.

Matson Navigation Company is an owner and operator of United States flag container ships. It provides liner service between various West Coast ports, Hawaii and certain western Pacific ports. In addition, it operates several container terminals that service its vessels. Matson

employs both traditional seamen and traditional longshoremen. It has both sea-based and land-based employees. Matson has an interest in the operation of any remedial scheme that affects its workforce and its ability to manage, on a cost-effective basis, employee injury claims.

The Longshore Claims Association (LCA) is a national association of individuals and companies involved in the defense of claims under the United States Longshore and Harbor Workers' Compensation Act and related maritime employment law. The LCA promotes expertise in claims administration through continuing education programs. It is a Longshore claims defense advocacy group that supports relevant issues in pending cases. Its membership includes Longshore employers, insurance carriers, risk managers, attorneys and experts in various related fields. The issues presented herein effect its membership.

Amici curiae are all involved in the day-to-day administration of employee injury claims from employees covered by the Longshore and Harbor Workers' Compensation Act. They have an interest in promoting the fair and just handling of these claims and an equally strong interest in avoiding costly multiple litigation of claims. They have an interest in seeing to it that the no fault remedial schemes at issue in this case operate as designed and intended by Congress.

II. SUMMARY OF ARGUMENT

Amici curiae join Harbor Tug and Barge to request reversal of the Ninth Circuit Court of Appeals on two

issues. (A) The Appeals Court erred in refusing to grant collateral estoppel effect to a prior finding in the LHWCA forum. *Amici Curiae* urge this Court to hold that any order awarding benefits under the LHWCA precludes subsequent litigation of a Jones Act claim for the same injury. (B) The Appeals Court erred in creating a new and expanded test for seaman status. *Amici curiae* urge reversal and adoption of a rule that defines the fleet as those vessels in navigation owned or controlled by the Jones Act employer.

A.

In its decision, the Court of Appeals for the Ninth Circuit acknowledges that the Longshore and Harbor Workers' Compensation Act (LHWCA)[1] and the Jones Act[2] are mutually exclusive remedies for injured maritime workers. This concept is, in the wake of recent opinions of this Court, no longer open to challenge. What remains to be identified is the "trigger event", the defining moment when the remedial schemes become mutually exclusive. On a time line, the Ninth Circuit has selected the last possible event, civil trail of the Jones Act case, as the trigger event. This, under the rubric of 'no double recovery', merely pays lip service to the doctrine of mutual exclusivity.

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[1] 33 U.S.C. § 901 et seq., created a workers' compensation system for certain maritime workers, but excluding coverage for seamen.

[2] 46 U.S.C. § 688 is a tort system for compensating injured seamen.

The Court below takes judicial notice of a Decision and Order of an Administrative Law Judge (ALJ) under the LHWCA. The ALJ finds that Papai is not a seaman, and that he is covered by and entitled to benefits under the LHWCA. The Appeals Court notes that the LHWCA claim "was fully litigated". However, the Appeals Court declines to apply collateral estoppel to the LHWCA Decision, and orders that the seaman status issue be submitted to a jury. Should Papai prevail on his claims before a jury, the employer will get a credit for sums received by Papai under the LHWCA. It reaches the conclusion that because there is no double recovery, there is mutual exclusivity.

The Appeals Court then holds that because collateral estoppel's purpose would not be served, it should not be applied. But the Court's reasoning does not support the outcome. It should be reversed.

(1) An Order properly issued under the LHWCA precludes any contrary finding by any civil court. To deny collateral estoppel to administrative orders would cause immense disruption to workers' compensation systems, inflate costs unnecessarily, and increase litigation dramatically.

(2) The Appeals Court construes LHWCA § 3(e)[3] as requiring that the LHWCA and the Jones Act be applied sequentially. The correct function of LHWCA § 3(e) is to grant the LHWCA employer credit for payments voluntarily made under the Jones Act. It should not be applied for the purpose suggested by the Appeals Court.

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[3] 33 U.S.C. § 903(e).

(3) The idea that no harm occurs if there is no double recovery is wrong. An employer faces double costs even if the employee does not make a double recovery. But even if there were not duplicate costs, lack of harm is insufficient to overcome statutory prohibitions. LHWCA §§ 5(a)[4] and 33(i)[5] prohibit the result reached by the Appeals Court.

(4) There was no indication that the seaman status issue was not vigorously litigated in the LHWCA trial. Papai had adequate incentive to argue against seaman status in order to obtain LHWCA benefits. Harbor Tug had adequate incentive to argue for seaman status to avoid LHWCA liability. If it had succeeded in the LHWCA claim, and if the summary dismissal had been sustained, the employer would have avoided liability in both forums.

(5) The Appeals Court says that allowing collateral estoppel for a formal Order would discourage LHWCA settlements. That is an insufficient basis for ignoring well established principals of collateral estoppel and strong statutory language. The Court bases this on its decision in *Figueroa v. Campbell*[6]. But the holding in *Figueroa* should be overruled. Further, application of principles of collateral estoppel reduce, rather than increase, litigation. The

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[4] 33 U.S.C. § 905(a) makes LHWCA benefits the exclusive liability of the employer.

[5] 33 U.S.C. § 933(i) makes LHWCA benefits the employee's exclusive remedy on account of employer fault.

[6] 45 F.3d 311 (9th Cir. 1995), holding that settlement of an LHWCA claim does not preclude subsequent Jones Act litigation.

doctrine of collateral estoppel was developed to prevent multiple litigation of the same issue, the possibility of inconsistent results, and to provide a degree of finality to judicial and quasi-judicial decisions.

(6) The Appeals Court suggests that LHWCA benefits are the functional equivalents of maintenance and cure, and should be merely precursors to more substantial remedies. But LHWCA benefits are only available to non-seamen; they are more varied, greater in scope, and greater in duration; and they are intended as a complete substitute for all tort remedies. Moreover, once Congress has spoken and set forth its policy decisions, the doctrine of judicial restraint should apply, barring constitutional challenge.

B.

The Court below erred when it expanded the "fleet seaman doctrine" to include, within the fleet, all vessels owned by all employers that have a collective bargaining agreement with Papai's labor union. The 'fleet seaman doctrine' applies only to vessels subject to common ownership or control, and that common ownership or control must be that of the Jones Act employer.

III. ARGUMENT

A. Papai Denied Seaman's Status in his LHWCA Claim, While Harbor Tug Asserted It. After Full Litigation, an ALJ Found Papai Was Not a Seaman, and Awarded LHWCA Benefits. Papai Cannot Now Relitigate that Same Issue in a Civil Court to Obtain a Different Result.

In 1927, Congress passed the LHWCA and established an administrative tribunal within the Department

of Labor to hear any claim brought under that Act. It provided that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim."[7] In 1972 Congress amended the LHWCA, in part providing that all powers, duties, and responsibilities previously vested in the deputy commissioner would now be vested in administrative law judges, who would hear cases in accordance with provisions of the Administrative Procedures Act, 5 U.S.C. § 554.[8] One of the questions presented in every claim for benefits under the LHWCA is whether the claimant is an "employee" as defined in the Act.[9] The definition includes certain classes of maritime workers, but specifically excludes eight classes of workers,[10] including "a master or member or a crew of any vessel".[11]

Under the doctrine of collateral estoppel, relitigation of issues between the same parties is barred once a judicial entity has decided an issue necessary to its judgment.[12] The doctrine applies to decisions of

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[7] 33 U.S.C. § 919(a).

[8] 33 U.S.C. § 919(d).

[9] 33 U.S.C. § 902(3).

[10] 33 U.S.C. § 902(3)(A)-(H). The excluded workers, in addition to seamen, are generally those involved in clerical, recreational, retail trade, marina operations, supply, delivery, aquaculture, and work on certain classes of small vessels.

[11] 33 U.S.C. § 902(3)(G).

[12] *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

administrative agencies as well as to decisions of Article III courts.[13]

All elements for collateral estoppel are met here. (i) The issue of crew member status under the LHWCA is the same as the issue of seaman status under the Jones Act.[14] (ii) The parties are the same in the LHWCA and the Jones Act proceedings. The injured party is John Papai and the employer is Harbor Tug in both actions. (iii) The ALJ Decision and Order is final. (iv) The Office of ALJ's is an administrative court of competent jurisdiction.[15]

The Appeals Court chose not to honor the ALJ Decision and Order. It found no fault with procedures under the LHWCA claim, the identity of the parties, the identity of the issue, or the finality of the LHWCA Decision and Order.[16] Instead, it chose to substitute its own concept of what the law ought to be for that which this Court and Congress had previously established. The Appeals Court, relying on *Figueroa*[17], concluded that allowing a Decision and Order to collaterally estop subsequent litigation would somehow encourage litigation. Yet the result in this case encourages double litigation, and in fact virtually assures it in a wide range of cases.

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[13] *United States v. Utah Construction and Mining Company*, 384 U.S. 394, 421 (1960).

[14] The term "member of a crew" in the LHWCA is a refinement of the term "seaman" in the Jones Act. *McDermott International, Inc v. Wilander*, 498 U.S. 337 (1991).

[15] 33 U.S.C. §§ 919(a), (d).

[16] In fact, it had no jurisdiction over Papai's LHWCA claim.

[17] *Figueroa v. Campbell*, 45 F.3d 311 (9th Cir. 1995).

1. Any Order Awarding Workers' Compensation Benefits Bars Subsequent Jones Act Litigation Because Disregard for the Collateral Estoppel Effect of an LHWCA Decision and Order Will Severely Disturb the Proper Functioning of Workers' Compensation Systems.

There is a dramatic split of opinion between the Fifth Circuit and the Ninth Circuit as to when the issue of seaman status is determined. In *Sharp*[18], the Fifth Circuit held that an order approving an LHWCA settlement necessarily included a finding of non-seaman status. Thus, no further litigation of seaman status could be allowed. In *Figueroa*[19], The Ninth Circuit held that collateral estoppel would only apply after a full evidentiary hearing on the seaman status question. Then the Ninth Circuit in *Papai*[20], held that no LHWCA order would be granted collateral estoppel effect.

The better rule, and that which these *amici curiae* urge, is that any order establishing liability under the LHWCA (or other workers' compensation act that excludes coverage for seamen) bars further seaman's claims for the same injury.

The LHWCA was created by Congress in 1927 to provide a unique workers' compensation scheme for a discrete class of maritime employees who were not subject to state workers' compensation laws and were not

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[18] *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992).

[19] *Figueroa v. Campbell*, 45 F.3d 311 (9th. Cir 1995).

[20] *Papai v. Harbor Tug and Barge*, 67 F.3d 203 (9th Cir. 1995).

entitled to traditional seamen's remedies.[21] In creating the Act and delegating the administration and adjudication of claims to the Department of Labor, Congress attempted to balance the conflicting interests of injured maritime employees in need of certainty of recompense and interests of employers in need of economic protection from the cost of maintaining liability insurance.[22]

In a long line of maritime and other cases, this Court has held that a statute "must be read in the light of the mischief to be corrected and the end to be attained."[23] The lower court decision does not further Congress's goal in enacting and amending the LHWCA. It does not eliminate the mischief that the Act was intended to eliminate. And it creates various opportunities for new mischief which these *amici curiae* ask this Court to avoid. The decision below will greatly increase litigation, greatly increase costs, and make a mockery of workers' compensation adjudication across the land.

The problem created by the decision of the Appeals Court is not limited to cases involving crew member

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[21] 33 U.S.C. § 903 (1927); *Southern Pacific Company v. Jensen*, 224 U.S. 205 (1917).

[22] *Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980).

[23] *Warner v. Goldtra*, 293 U.S. 155, 158 (1934), interpreting "seaman" in the Merchant Marine Act; quoted with approval in *South Chicago Coal & Dock Co. v. Bassett (Schumann)*, 309 U.S. 251, 259 (1940), interpreting "crew member" in the LHWCA; *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944), interpreting "employee" in the NLRA; and *McDermott International v. Wilander*, 498 U.S. 337, 349 (1991), referring to this "salutary principal" when interpreting "seaman" in the Jones Act.

versus longshore status. It extends to virtually any workers' compensation claim under any state or federal law anywhere in the land.

All workers' compensation systems have threshold coverage issues. If such issues are not decided in favor of the employee, there is no coverage under the workers' compensation law, and remedies lie elsewhere. In the LHWCA, such threshold issues include employee status, which necessarily entails lack of crew member status. But all workers' compensation systems include threshold issues of whether an injured worker is an "employee" or an "independent contractor", and whether an injury occurred in the course of employment, subject to the workers' compensation scheme, or outside the course of employment, subject to a civil remedy.

If a civil court can go behind a workers' compensation finding on crew member status, it can just as easily go behind a finding on independent contractor or course of employment. Thus a claimant can allege he is in the course of employment or that he is an employee in order to obtain workers' compensation benefits, and then sue his employer in a civil court, asking that civil court to disregard the previous assertion and the previous finding of workers' compensation coverage. This would create widespread duplicate litigation and increased costs.

2. Section 3(e) of the LHWCA Cannot Be Construed to Justify Ignoring Decisions Under That Act

This Court refers to LHWCA § 3(e) in *Southwest Marine v. Gizoni*[24]. The lower court misread both the function of LHWCA § 3(e) and this Court's reference to it. Section 3(e) only applies to benefits voluntarily paid under the Jones Act, not to those paid pursuant to an order. If there were an order for payment under the Jones Act, there would of necessity be a finding of seaman status by a civil court. Such a finding would terminate any LHWCA rights, and render the credit issue moot. As this Court stated, "an employee who received voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act." . . . "This is so, quite obviously, because the question of coverage has never actually been litigated."[25]

3. Credit for LHWCA Benefits Is an Insufficient Remedy If Employers are Subject to Double Costs.

The Ninth Circuit states that equitable estoppel does not apply. It cites footnote 5 of this Court's *Gizoni* decision for the proposition that where "credit removes the threat of double recovery, the critical element of detrimental reliance does not appear."[26] Neither equitable estoppel nor detrimental reliance are being argued. However, the thought that mere credit is a sufficient remedy

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[24] *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).

[25] *Gizoni* at 91.

[26] Quoting *Gizoni* at 92, n.5.

for the employer is mistaken. It may prevent double recovery but does not prevent double costs.

There are many remedial schemes that provide compensation to accident victims. Some are based on tort principals, such as the Jones Act. Some are based on no-fault principals, such as automobile insurance in certain states, workers' compensation and the LHWCA. A perfectly efficient remedial scheme, in a macro-economic sense, would deliver benefits to the injured party equal to the costs to the paying party. But no remedial scheme is perfectly efficient. The measure of efficiency is the ratio of benefits over costs.

In 1993, the total workers' compensation benefits delivered in all state and federal workers compensation programs in the United States was 42.9 billion dollars. But the total employer cost of providing workers' compensation was 57.3 billion dollars in the same year.[27] That ratio, or efficiency, is 74.87%. Tort systems were less efficient. In 1991, only 43 cents of every dollar spent on tort lawsuits went to plaintiffs, the balance going to litigation costs and administrative costs.[28] That ratio is 43%.

The argument that credit solves all problems is flawed because it only considers the net benefits received by the employee. It ignores the very substantial employer costs that do not go into the credit calculation. For the

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[27] Schmulowitz, *"Workers' Compensation: Coverage, Benefits and Costs, 1992-93*, Social Security Bulletin, Summer 1995", abstract available at http://www.ssa.gov/statistics/abstracts.html.

[28] Griffin, *"Tort Reform in the U.S. Liability System"*, available at http://www.brobeck.com/docs/meddevic.htm.

employer and for society, serial litigation in dual forums for the same injury is very wasteful. That economic waste averages over one fourth of the total cost of the workers' compensation claim. For the employee, since net recovery in the first case is credited to recovery in the second case, there is no substantial advantage to having litigated the first case.

The result of the decision below is economic waste without any substantial benefit.

4. There Is No Evidence that Seaman Status Was Not Adequately Litigated In the LHWCA Trial

The Appeals Court speculated that the seaman issue was not truly litigated. It does not cite evidence for that conclusion. It ignores the fact that it was Papai, not Harbor Tug who chose to litigate that issue before the ALJ. It ignores the fact that had Harbor Tug prevailed on that issue, there would have been no LHWCA liability. And if the summary dismissal were sustained, Harbor Tug would have escaped liability in both forums. The ALJ Decision and Order shows that the seaman issue was raised and litigated. Speculation as to motive cannot substitute for evidence in the record that the issue was validly litigated.

5. Collateral Estoppel Does Not Encourage Litigation

The Court below opined that allowing collateral estoppel for an LHWCA award would encourage litigation. Its rationale is based on its earlier decision in

Figueroa[29], which held that settlement of an LHWCA claim does not preclude subsequent litigation of a Jones Act claim for the same injury. There are two problems with this approach.

First, it is refusal to honor the first decision that encourages, indeed guarantees, the second litigation.

Second, and more important, *Figueroa* is in error. An order approving an LHWCA settlement has the same force and effect as an order following an LHWCA trial. The Fifth Circuit holds in *Sharp*[30] that an order approving an LHWCA settlement does establish coverage under the LHWCA, and precludes subsequent litigation on the seaman issue. *Sharp* is the better reasoned, and should, at a minimum, be followed in all circuits.

LWHCA § 5 makes LHWCA benefits the exclusive liability of the employer for covered injuries. LHWCA § 33(i) makes LHWCA benefits the exclusive remedy of the employee on account of employer fault. Coverage under the LHWCA is a prerequisite to any LHWCA order, whether approving a settlement, approving stipulations, or following an evidentiary hearing. That is because 'liability' under the LHWCA invokes exclusivity, and any order to pay LHWCA benefits establishes that liability.

It is important to consider that no such order can be engineered surreptitiously by the employer. It must of necessity be sought out by the employee on a claim of

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[29] *Figueroa v. Campbell*, 45 F.3d 311 (9th Cir. 1995).

[30] *Sharp v. Johnson Bros. Corp*, 973 F.2d 423 (5th Cir. 1992).

entitlement under the LHWCA. An employee who does not wish an order establishing liability need only either refrain from claiming or withdraw his claim of entitlement.

6. Where Congress Has Expressed Social Policy, it is Not the Proper Function of the Courts to Recast That Policy, But to Apply it.

The Appeals Court characterizes LHWCA benefits as the functional equivalent of maintenance and cure. They are not. LHWCA benefits are more varied, at a higher rate, for a longer duration, and are intended to be a complete system of compensation.

LHWCA medical care is analogous to "cure". And LHWCA temporary total disability is analogous to maintenance. But the LHWCA also provides four classes of benefits foreign to a seaman's maintenance and cure: (i) vocational rehabilitation services[31], (ii) permanent partial disability[32], (iii) permanent total disability[33], and (iv) death benefits[34].

Maintenance is paid at a daily rate, set by contract or custom of the port. This rate rarely exceeded $35 per day. LHWCA weekly compensation is at two thirds of the employee's average earnings[35], up to twice the national

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[31] 33 U.S.C. § 939(c)(2).

[32] 33 U.S.C. § 908.

[33] 33 U.S.C. § 908(a).

[34] 33 U.S.C. § 909.

[35] 33 U.S.C. § 908.

average weekly wage[36]. The current maximum LHWCA weekly compensation rate is $801.06, over three times the maintenance rate. Maintenance ends with maximum medical improvement or return to work. LHWCA permanent disability can continue for life[37].

There is nothing in maintenance and cure jurisprudence suggesting that to be a complete system of compensation for injury. But the LHWCA, at §§ 5(a) and 33(i) plainly states that benefits under that Act are both the exclusive liability of the employer and the exclusive remedy of the employee on account of employer fault.

Where Congress is silent and the statutes do not set forth public policy, courts are empowered to set policy. But where Congress has spoken, and the statute is clear, "sympathy is an insufficient basis for approving a recovery that Congress has not authorized."[38] As this Court explained, it is not the intent of Congress to provide disabled workers with a complete remedy for their industrial injuries.

> While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. On the contrary, they provide employers with definite and lower limits of

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[36] 33 U.S.C. § 906(b)(1).

[37] 33 U.S.C. §§ 908(a), (c)(21).

[38] *Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs (Cross)*, 449 U.S. 268, 284 (1980).

> potential liability than would have been applicable in common law tort actions for damages.[39]

And as this Court subsequently stated, referring to *Cross*,

> There we recognized that the Act was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other.[40]

The exclusivity of benefits under the LHWCA was so important that Congress addressed it twice. In § 5(a), the statute provides that benefits under the LHWCA are the exclusive liability of the employer. In § 33(i), the statute provides that benefits under the LHWCA are the exclusive remedies of the employee as a result of employer or fellow employee fault. Yet the appellate court, reasoning that subsequent litigation would allow the largest recovery possible, shunted aside the exclusivity provisions, thereby allowing the very remedies prohibited by §§ 5(a) and 33(i).

Moreover, the appellate court's decision is not good policy. It frustrates the predictability and the finality of decisions. It decreases efficiency without a commensurate increase in benefits. It greatly increases the amount of litigation. It disturbs the delicate balance wrought by Congress between the competing interests of employees and employers. And it creates the potential, which no

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[39] *Ibid.* at 281.

[40] *Morrison-Knudsen v. Director, OWCP (Hilyer)*, 462 U.S. 424, 435 (1993).

doubt all parties would recognize as unpalatable, for an employee to be denied benefits in both forums. For if a civil court is not bound by an LHWCA Decision and Order finding that an employee is not a seaman, there is no logical reason why it must be bound by an LHWCA Decision and Order that a claimant is a seaman. If longshore benefits are denied because the Administrative Law Judge determines that the claimant is a seaman, and a jury subsequently decides that the claimant is not a seaman, he has lost in both forums and recovers nothing for his injury. Injured maritime workers should be entitled to either one or the other remedy, but not both.

B. Seaman Status is Not Portable

The Ninth Circuit, in the opinion below, has, perhaps inadvertently, fashioned a new test for seaman status. This test eviscerates time honored principles of maritime law and should be addressed and reversed by this Court. The new Ninth Circuit test for seaman status no longer requires "an employment related connection to a vessel in navigation." As matters now stand, all that is required is a "prior employment related connection to a vessel in navigation." This expansion of the fleet seaman doctrine to include, within the fleet, vessels owned by prior, different employers has the potential of exposing landlocked employers to Jones Act liability. Further, it moots the "land-based/sea-based"[41] distinction between

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[41] *McDermott International, Inc., v. Wilander*, 498 U.S. 337, 354 (1991).

maritime employees covered under LHWCA and those covered under the Jones Act.

1. The Fleet Must Be Subject to Common Ownership or Control

The fleet seaman doctrine was born in the river trade of the Midwest, where short voyages dictated different operational requirements. Rather than signing articles for year-long voyages, seamen were assigned to different tugs, barges and towboats on an almost daily basis. In order to avoid the harshness of the "more or less permanent connection to a vessel in navigation" test set forth in *Offshore Co. v. Robison*,[42] the Courts fashioned the fleet seaman test to accommodate seamen who owed an allegiance to a fleet of vessels rather than to one particular vessel. See *Guidry v. Continental Oil Co.*[43] and *Barrett v. U.S.A. Chevron, Inc.*[44] However, in each instance, the fleet was under common ownership or control.

Now, for the first time, the Ninth Circuit instructs that plaintiffs' employment with prior employers is relevant to the seaman status test. The fleet has been redefined to include all the vessels owned by all the different employers that hire workers from the employee's union. This leads to the conclusion that, unless a new employment situation amounts to a permanent change of status, the seaman carries his seaman

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[42] 266 F.2d 769, (5th Cir. 1959).

[43] 640 F.2d 523 (5th Cir. 1981).

[44] 781 F.2d 1067 (5th Cir. 1986) (en banc).

status on his back from job to job, regardless of the nature of work performed for the new employer.

Around the turn of the century, employers and employees bargained away certain rights in order to bring about workers' compensation regimes in most states. Among the rights bargained away was the employees' right to sue the employer for damages for work-related bodily injury. In return, employers agreed to compensate employees for work-related injuries, regardless of fault. The decision of the Ninth Circuit in this case undermines the very core of this bargain, by restoring the right to sue to certain employees. This new group of favored employees are those who were once seamen and who continue to work out of the same union.

Under this new 'fleet seaman' test, there is no requirement that the employee have a work-related connection to a vessel in his current employment or, for that matter, be injured afloat. For example, under the Ninth Circuit analysis, Mr. Papai would still be eligible for seaman status if he had been employed by a subcontractor hired by Harbor Tug & Barge Co. to paint PT. BARROW. To continue the example, if the painting subcontractor hires day workers out of Mr. Papai's union, Mr. Papai would be covered under the Jones Act. The painting subcontractor need not own or control a single vessel, for, under the new Ninth Circuit rule, it would be deemed to have some undefined form of ownership or control of the various vessels belonging to the other employers that hire out of the same union. Land-based employers will face sea-based exposures.

This land-based/sea-based distinction becomes especially problematic when confronting claims made by construction workers. Certain trades, like pile drivers and equipment operators, work sometimes on derrick barges and sometimes on land. The expanded fleet presents employers with the very real possibility that they may have seamen on the payroll if their pile drivers or crane operators had worked in waterfront construction for prior employers. Even when the current employer is, for example, building a freeway in the middle of California's central valley. All that is required is that both the prior and current employer hire from the same union. Employment that is purely land-based would now arguably come under the Jones Act.

2. A Seaman's Work Must Be Sea-Based, With Exposure to the Perils of the Sea.

It is a time honored principle of maritime law that seamen are entitled to the "special protection of the courts."[45] As noted in *Wilander*, "traditional seamen's remedies . . . have been universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and disadvantages to which they who go down to the sea are subjected."[46] It is the sea-based employees who go down to the sea and who are subject to the attendant perils.

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[45] *Harden v. Gordon*, F. Cas. No. 6047 (1823, CC Me.) (Story, J.).

[46] 498 U.S. 337, 350 (*quoting Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1991) (Stone, C.J., dissenting)).

The land-based/sea-based distinction was the demarcation line adopted in *Wilander*. It was followed in *Latsis*. But it was jettisoned by the court below. *Wilander* and *Latsis* focused on the land-based/sea-based distinction in current employment. In *Latsis*, the appeal was taken from the Second Circuit Jones Act Status jury instruction, as follows: "The test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be satisfied where a jury finds that (1) the plaintiff contributed to the function of or helped accomplish the mission of a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea."[47]

The *Latsis* Court granted certiorari on the following question: "What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act?"[48] The Court then answered the question as follows "the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its nature and duration."[49]

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[47] *Latsis*, at 2182.

[48] *Latsis*, at 2181.

[49] *Latsis*, at 2194.

When the instruction is updated with the holding in *Latsis*, only parts (2) and (3) are effected. The requirement that plaintiff's employment involve regular exposure to the hazards of the sea is unaffected. Rather, as noted by Justice Stevens in his concurring opinion,[50] the majority opinion in *Latsis* narrows the scope of Jones Act coverage. The unwarranted expansion of the fleet seaman doctrine by the Court below eviscerates the very issue that this Court addressed in *Latsis*. If prior employment, with different employers, is the standard by which Jones Act status is judged, then there can be no requirement that current employment with the alleged Jones Act employer, involve or concern exposure to the "hazards of the sea." It need not even be sea-based. Seaman status would travel to land-locked employment. There is no justifiable reason for such an extension of Admiralty jurisdiction.

The Court below has crafted a new standard, which, simply put, is "once a seaman, always a seaman." This new standard guts the doctrine of LHWCA – Jones Act mutual exclusivity. If not reversed, it will burden an already beleaguered industry. American shipowners and all waterfront employers will, of necessity, buy multiple insurance coverages for their entire work force, out of fear that an employee's work history will take them into uncovered waters. This is not the intent of either remedial scheme. It does not need a further burden to employment. Nor does it deserve increased liability exposure.

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[50] *Latsis*, at 2197 (joined by Thomas and Breyer).

IV. CONCLUSION

The Ninth Circuit, with its opinion below, has undone an important distinction between the LHWCA and the Jones Act, a distinction carefully drawn by this Court in several recent opinions. Under the rubric of no double recovery, it pays mere lip service to the doctrine of mutual exclusivity. Then it further degrades the process by expanding Jones Act coverage to land-based employees. It has taken a no-fault compensation system, the LHWCA, and necessarily turned it into a highly litigious forum where employers must necessarily fight every step of the way. It has burdened the system with additional overhead without additional benefit. For the reasons set forth above, this Court should reverse the Court below with instruction to reinstate the findings of the trial court based on application of the exclusive remedy provisions of the LHWCA, or, at a minimum, application of collateral estoppel. Lastly, this Court should reverse or vacate that portion of the opinion below that extends the fleet seaman doctrine to include vessels not owned or controlled by the current Jones Act employer.

Dated: November 12, 1996

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APPENDIX A – RELEVANT STATUTES

5 U.S.C. § 554 – Adjudication

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved –

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of –

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had

for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for –

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not –

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except

as witness or counsel in public proceedings. This subsection does not apply –

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

33 U.S.C. § 902 – Definitions

When used in this chapter –

. . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include –

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 903 – Coverage

. . .

(e) Credit for benefits paid under other laws

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46 (relating to recovery for

injury to or death of seamen) shall be credited against any liability imposed by this chapter.

33 U.S.C. § 905 – Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

33 U.S.C. § 906 – Compensation

. . .

(b) Maximum rate of compensation

(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

33 U.S.C. § 908 – Compensation for disability

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly

wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subsection (b) or subsection (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two-hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 912 of this title, or a claim for compensation, under section 913 of this title, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the

elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in the class of disability, the compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

(22) In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subsection, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subsection shall apply.

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be 66⅔ per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 902(10) of this title, payable during the continuance of such impairment.

(d)(1) If an employee who is receiving compensation for permanent partial disability pursuant to subsection (c)(1)-(20) of this section dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, as follows:

(A) if the employee is survived only by a widow or widower, such unpaid amount of the award shall be payable to such widow or widower,

(B) if the employee is survived only by a child or children, such unpaid amount of the award shall be paid to such child or children in equal shares,

(C) if the employee is survived by a widow or widower and a child or children, such unpaid amount of the award shall be payable to such survivors in equal shares,

(D) if there be no widow or widower and no surviving child or children, such unpaid amount of the award shall be paid to the survivors specified in section 909(d) of this title (other than a wife, husband, or child); and the amount to be paid each such survivor shall be determined by multiplying such unpaid amount of the award by the appropriate percentage specified in section 909(d) of this title, but if the aggregate amount to which all such survivors are entitled, as so determined, is less than such unpaid amount of the award, the excess amount shall be divided among such survivors pro rata according to the amount otherwise payable to each under this subparagraph.

(2) Notwithstanding any other limitation in section 909 of this title, the total amount of any award for permanent partial disability pursuant to subsection (c)(1)-(20) of this section unpaid at time of death shall be payable in full in the appropriate distribution.

(3) An award for disability may be made after the death of the injured employee. Except where compensation is payable under subsection (c)(21) of this section, if there be no survivors as prescribed in this section, then the compensation payable under this subsection shall be paid to the special fund established under section 944(a) of this title.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity

the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

. . .

(i)(1) Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

(2) If the deputy commissioner disapproves an application for settlement under paragraph (1), the deputy commissioner shall issue a written statement within thirty days containing the reasons for disapproval. Any party to the settlement may request a hearing before an administrative law judge in the manner prescribed by this chapter. Following such hearing, the administrative law judge shall enter an order approving or rejecting the settlement.

(3) A settlement approved under this section shall discharge the liability of the employer or carrier, or both.

Settlements may be agreed upon at any stage of the proceeding including after entry of a final compensation order.

. . .

33 U.S.C. § 909 – Compensation for death

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $3,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed $66^{2}/_{3}$ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving

the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed $66^2/_3$ per centum of such wages.

(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than $66^2/_3$ per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section 152 of Title 26, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between $66^2/_3$ per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 906(b) of this title, but –

(1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 906(b)(1) of this title; and

(2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 910(i) of this title) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(f) All questions of dependency shall be determined as of the time of the injury.

(g) Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the Secretary may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of

the commuted amount of such future installments of compensation as determined by the Secretary.

33 U.S.C. § 919 – Procedure in respect of claims

(a) Filing of claim

Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

. . .

(d) Provisions governing conduct of hearing; administrative law judges

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C. § 933 – Compensation for injuries where third persons are liable

. . .

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

33 U.S.C. § 939 – Administration by Secretary

. . .

(c) Furnishing information and assistance; directing vocational rehabilitation

(1) The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

(2) The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such rehabilitation. The Secretary may in his discretion furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this chapter to render a disabled employee fit to engage in a remunerative occupation. Where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund provided for in section 944 of this title in such amounts as may be necessary to procure such services, including necessary prosthetic appliances or other apparatus. This fund shall also be available in such amounts as may be authorized in annual appropriations for the Department of Labor for the costs of administering this subsection.

46 U.S.C. § 688 – Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of

such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred –

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

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(10)

No. 95-1621

In The

Supreme Court of the United States

October Term, 1996

HARBOR TUG AND BARGE COMPANY,

Petitioner,

-against-

JOHN PAPAI AND JOANNA PAPAI,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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41pp

QUESTIONS PRESENTED

(1) Can a vessel-based harbor-worker sue for seaman's remedies after an Administrative Law Judge has formally determined that he was an LHWCA beneficiary, and therefore not a "member or a crew" at the time of his injury?

(2) Can a "casual" maritime worker, injured in the course of an ordinary union dispatch, base his seaman status on his overall work history out of that union, or must he limit the inquiry to his specific assignment at the moment of injury?

PARTIES TO THE ACTION

Plaintiffs/Respondents:

John Papai and Joanna Papai

Defendant/Petitioner:

Harbor Tug and Barge Company

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INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed, with the consent of the parties, on behalf of the United Brotherhood of Carpenters and Joiners of America ("UBCJA"). The UBCJA is an international labor organization with affiliates in the United States and Canada. It enjoys a total membership of more than 567,000 working men and women. Many of those men and women work upon the navigable waters of the United States. They work as deep sea divers, diver tenders, piledrivers, barge workers, carpenters, riggers, welders, and marine platform builders. They work on rivers, in harbors, and upon or beneath the high seas. They construct piers, wharves, bridges, oil platforms, submarine pipelines, underwater transit tubes, and open ocean sewer outfalls. They perform those tasks from crane ships, dive vessels, derrick barges, dredges, tugs and other special purpose construction vessels owned or operated by their employers. Their work "*necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land."[1] This Court has confirmed their maritime status under both the Longshore and Harbor Workers Compensation Act ("LHWCA")[2] and the Jones Act.[3] We respectfully submit that this status gives them an abiding interest in the question for review.

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[1] *Wallace v. Oceaneering International*, 727 F.2d 427, 436 (5th Cir.1984) [original emphasis].

[2] *E.g., Director, OWCP v. Perini North River Assoc.*, 459 U.S. 293 (1983) [piledriver held Longshore "employee"].

[3] *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) [piledriver held Jones Act "seaman"].

SUMMARY OF ARGUMENT

Sailing, as it does, in the wake of *McDermott International, Inc. v. Wilander*[4], *Southwest Marine, Inc. v. Gizoni*[5] and *Chandris, Inc. v. Latsis*,[6] this case not only bears us back into "occupied waters" long "dominated by federal statute",[7] but requires us to thread the tricky channel that runs between the Jones Act[8] and the LHWCA.[9] Nailing the banners of mutual exclusivity and election of remedies to the mast, petitioner Harbor Tug & Barge ("HTB") and its *amici* surge through those statutes under all plain sail, and urge the Court to cut injured maritime workers off from their traditional seaman's remedies whenever a federal administrative law judge has awarded them interim LHWCA benefits. Turning a blind eye on the day-to-day realities of casual waterfront work, they next insist that the "fact specific" inquiry into seaman status[10] should ignore a union hand's overall work history and focus solely on the narrow job to which he or she was dispatched on the day of the accident. The UBCJA respectfully submits that these arguments misinterpret the letter and logic of both the Jones Act and the LHWCA.

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[4] 498 U.S. 33 (1991).

[5] 502 U.S. 81 (1991).

[6] ___ U.S. ___, 115 S.Ct. 807, 112 L.Ed.2d 111 (1995).

[7] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990).

[8] 46 U.S.C. § 688.

[9] 33 U.S.C. §§ 901 *et seq.*

[10] *Wilander, supra*, 498 U.S. at 356.

We all begin our voyage with the inarguable proposition that the Jones Act and the LHWCA are "a pair of mutually exclusive remedial statutes".[11] What is more, we all concede the "salutary principle" that both statutes " 'must be read in the light of the mischief to be corrected and the end to be attained.' "[12] Indeed, we even all agree that both statutes must be construed "liberally", "flexibly" and "expansively" in order to extend their remedial coverage.[13] But in the end, we seem to be looking at the problem through different ends of the telescope.

Relying primarily on recent Fifth Circuit authority,[14] and showing remarkably little sympathy for what the older Fifth Circuit cases referred to as "the difficulties faced by injured maritime workers arguably both seamen and harbor workers who must choose whether and by what means they will pursue remedies that in substantive theory are perfectly mutually exclusive but which seem in practice to frequently overlap each other's borders",[15] HTB and its *amici* take the narrow, doctrinal view that, quite apart from considerations of collateral estoppel, "the plain meaning of [LHWCA] § 905(a) and the expressed Congressional intent is that a claimant who is

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[11] *Wilander, supra*, 498 U.S. at 353.

[12] *Wilander, supra*, 498 U.S. at 349 *quoting Warner v. Goltra*, 293 U.S. 155, 158 (1934). *See also, South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940).

[13] *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 258 (1977) [LHWCA]; *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 52 (1926) [Jones Act].

[14] *E.g., Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992); *Fontenot v. AWI, Inc.*, 923 F.2d. 1127 (5th Cir. 1991).

[15] *Simms v. Valley Line Co.*, 709 F.2d 409, 411 (5th Cir. 1983).

awarded benefits under the LHWCA is precluded from seeking other remedies against his employer."[16] The UBCJA, on the other hand, agrees with Professor Schoenbaum, and espouses the broader, more pragmatic view that, "In reality, as *Gizoni* proves, there is overlap between the two Acts, and if a worker falls into both categories, he can opt for whichever remedy is more lucrative or suitable, which will virtually always be seaman status."[17] In fact, the overlap probably dates at least as far back as *Reed v. the S.S. YAKA*.[18] To quote one of the leading circuit court cases on point, "If the claimant is not simply substituting in a single phase of a seaman's duties, but is a member of the crew, we see no reason why under *YAKA*, despite receipt of compensation, he may not also sue his employer under the Jones Act."[19] This, of course, serves the most "important purpose of the compensation statute, to provide immediate relief to an injured employee",[20] without abridging the primary object of the Jones Act, to protect those who do business on great waters from "the perils of the sea."[21] As Professor Larson teaches:

> "The community has decided that injured workmen and their families shall have as a minimum

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[16] *Brief of Petitioner, p. 20.*

[17] 1 Schoenbaum, *Admiralty and Maritime Law* (2d ed.) § 6-9, p. 260.

[18] 373 U.S. 410 (1963).

[19] *Biggs v. Norfolk Dredging Corp.*, 360 F.2d 360, 364 (4th Cir. 1969).

[20] *Biggs v. Norfolk Dredging Corp.*, 360 F.2d 360, 364 (4th Cir. 1969).

[21] *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2195.

> the security that goes with non-fault compensation. It is not for the individual, once he is part of that system, to elect whether its protection is a good idea for him or not. If he accepts or claims its benefits, this is not an election but merely the setting in motion of a protective process ordained by the state. This being so, it would undermine and prejudice the operation of this protective public program if the claimant were put in the position of risking the loss of other valuable rights, such as those under the Jones Act, by the mere fact of accepting or invoking this basic system of compensation protection. It is of the nature of compensation, as distinguished from damage actions, that it is intended to be both prompt and reliable, in order to perform its function of caring for the immediate economic and medical needs of an injured worker and his family. If, then, he accepts or claims compensation as his first move, perhaps fully intending to follow this with a Jones Act action, this should not be thought to be sinister, deceitful, or avaricious on his part. He is setting out to ensure that he gets the minimal social insurance protection that he may be entitled to. If it turns out later that he is entitled to a more generous award under a different system, since the compensation award will be credited on the larger award, there has been no serious harm done."[22]

The petitioner's and the UBCJA's respective views of the seaman status question diverge down a similar crossroad. Turning their backs on the well settled principle

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[22] 4 Larson, *Workmen's Compensation Law*, Section 90.51, p. 16-366 to 16-367 (1983).

that, "The issue of an injured worker's status as a seaman should be addressed with reference to the nature and location of his occupation taken as a whole",[23] HTB and its *amici* insist that "seaman status must be based upon the claimant's work assignment when injured."[24] The UBCJA contends that this approach not only looks at that problem through a keyhole, but varnishes it with "a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his [or her] regular duties."[25]

WHEREFORE we respectfully urge this Court to affirm the decision below.

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[23] *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 (5th Cir. 1980).

[24] *Brief of Petitioner, p. 39.*

[25] *Longmire v. Sea Drilling Corp., supra*, 610 F.2d at 1347.

ARGUMENT

I.

UNION MARITIME WORKERS, LIKE JOHN PAPAI, SHOULD BE ABLE TO EXERCISE THEIR TRADITIONAL STATUTORY AND COMMON LAW RIGHTS AS SEAMEN EVEN AFTER AN ADMINISTRATIVE LAW JUDGE HAS AWARDED THEM WORKERS' COMPENSATION BENEFITS UNDER THE LHWCA.

1. Despite the Statutes' Mutual Exclusivity, the Maritime Law Has Always Permitted Vessel-Based Harbor Workers to Pursue Parallel Jones Act and LHWCA Claims for the Same Injury.

The history of these two statutes has been told well and often elsewhere.[26] We won't rehash it here except to reiterate that, while they have always been mutually exclusive, the courts have long recognized "that in a practical sense, a 'zone of uncertainty' inevitably connects the two Acts."[27] Quite apart from that decades-old "zone of uncertainty", after *Southwest Marine, Inc. v. Gizoni*[28] the lower courts quickly recognized that "some maritime workers may be Jones Act seamen who are injured while also performing a job specifically enumerated under the LHWCA, and, therefore, are entitled to recovery under both statutes, although double recovery of any

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[26] See, e.g., *Wilander, supra*, 498 U.S. at 341-354; *Northeast Marine Terminals Co., Inc. v. Caputo, supra*, 432 U.S. at 256-273; Gilmore & Black, *The Law of Admiralty* (2d ed.) 404-455; Baer, *Admiralty Law of the Supreme Court* (3d ed.) 132-300.

[27] *Simms, supra*, 709 F.2d at 411.

[28] *Supra.*

damage element is precluded."[29] It is therefore well established that "[t]here is nothing sinister about a worker who claims to be physically disabled from injuries incurred during his employment, attempting either personally or through counsel, to obtain recovery by whatever lawful remedy or remedies are available to him."[30] This is especially true in an age of congested dockets and delayed litigation.[31] Without access to interim LHWCA benefits, workers like John Papai might have to subsist on "maintenance and cure". That sclerotic remedy dates back to the shipowner's gothic obligation to provide injured seamen with lodging, a nurse, a candle and food,[32] and can condemn 20th century families to as little as $8.00 a day in provisional benefits.[33] Worse still, unlike LHWCA benefits, which succor both temporary[34] and permanent conditions,[35] the right to maintenance and cure expires altogether as soon as the injured seaman reaches "maximum medical cure" – whether or not he or she is able to return to work.[36] As Professors Gilmore and

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[29] *Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir 1995).

[30] *Boatel, Inc. v. Delamore*, 379 F.2d 850, 854 (5th Cir. 1967).

[31] *See, gen., Report of the Federal Courts Study Committee* (April 2, 1990) pp. 4-10.

[32] Gilmore & Black, *supra*, 281; 1 *Benedict on Admiralty* (7th ed.) 1-20.

[33] *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 946 (9th Cir. 1986).

[34] 33 U.S.C. § 908(b).

[35] 33 U.S.C. § 908(a).

[36] *Wood v. Diamond M Dredging Co.*, 691 F.2d 1165, 1170 (5th Cir. 1982). *See, also, Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Farrell v. U.S.*, 336 U.S. 511 (1949).

Black observed, there is thus no real down side to allowing seamen to collect modern workers' compensation while their Jones Act claims are pending.[37] As they put it, "It is only because of a series of accidents in our legal history that the payment of medical expenses and a living allowance to an injured worker is thought to be entirely consistent with his [or her] damage recovery if the payment is called maintenance and cure but inconsistent with the damage recovery if it is called compensation."[38] What is more, as we'll discuss in what follows, injured waterfront workers like John Papai must turn perforce to the LHWCA when their employers (and/or erroneous lower court rulings) refuse to recognize their Jones Act status. In light of all these harsh realities, the maritime law has always permitted waterfront workers like John Papai to pursue successive LHWCA and Jones Act remedies for the same injury.[39]

This, of course, raises inevitable collateral considerations. HTB and its *amici* try to wield those collateral considerations, like a scythe, to cut injured waterfront workers off from their historic seaman's rights. But this Court has traditionally used them as a shield to shelter workers who " 'are by the peculiarity of their lives liable

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[37] Gilmore & Black, *The Law of Admiralty* (2d ed.) 435.

[38] *Id.*

[39] *See e.g., Reed v. The S.S. YAKA, supra; Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991); *Boatel, Inc. v. Delamore*, 379 F.2d 850 (5th Cir. 1967); *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968); *Biggs v. Norfolk Dredging Co., supra; Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661 (D.C.Ha. 1982); *Lewis v. Roland E. Trego & Sons*, 359 F.Supp. 1130 (D.C.Md. 1973).

to sudden sickness from changes of climate, exposure to perils, and exhausting labor.' "[40]

Without putting too fine a point on it, "The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties and liabilities in the sea-service, which do not belong to home pursuits."[41] Those peculiar rights and privileges are woven deeply into the issues we're discussing here. For example, notwithstanding their mutual exclusivity, it is " 'universally accepted' that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act".[42] In fact, where the evidence is enough to send the threshold seaman question to a jury, this Court has ruled that it is reversible error to permit the employer to prove that the worker accepted LHWCA benefits while waiting for trial.[43]

It is equally well established that injured waterfront workers cannot summarily cut themselves off from the Jones Act by filing an administrative application for LHWCA benefits.[44] The law in this area "tolerates no

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[40] *Chandris, supra,* 115 S.Ct. at 2183 *quoting Harden v. Gordon,* 11 F.Cas. 480, 485 (CC Me. 1823).

[41] *Id* at 2195 [Stevens J. concurring].

[42] *Gizoni, supra,* 502 U.S. at 91. *See also, Simms, supra,* 709 F.2d at 412.

[43] *Gizoni, supra; Tipton v. Socony Mobil Oil,* 375 U.S. 34, 37 (1963). *See, also, Eichel v. New York Central R.R. Co.,* 375 U.S. 253 (1963); *Simmons v. Hoegh Lines,* 784 F.2d 1234, 1237 (5th Cir. 1986); *Doucet v. Gulf Oil Corp.,* 783 F.2d 518, 523 (5th Cir. 1986).

[44] *Simms, supra,* 709 F.2d at 411-412; *Biggs, supra,* 360 F.2d at 364.

distinction between the mere availability or voluntary payment of compensation and a positive claim for it."[45] As the cases explain:

> "[N]ot to allow suit where compensation has been affirmatively sought would discourage the spontaneous initiation of payments. Under such a policy the employer who immediately and voluntarily begins compensation payments would be subject to suit; the employer who forces his employee to seek compensation would be immune from suit."[46]

In short, it was wrong of HTB and its *amici* to suggest that Congress intended the "exclusive remedy" provisions in § 905(a) of the LHWCA[47] to estop all vessel-based harbor workers from pursuing their potential Jones Act rights. To begin with, as this Court has repeatedly ruled, far from erecting an impervious barrier to a harbor worker's historic seaman's remedies, § 905(a) wasn't even designed to bar them from suing their vessel-owning employers for "dual capacity" negligence.[48] More importantly, HTB's blanket insistence that Congress drew up § 905(a) to confine harbor workers like John Papai to the LHWCA overlooks the fact "the LHWCA and its exclusionary provision do not apply to a harbor worker who is also a 'member of a crew of any vessel,' a phrase that is a

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[45] *Biggs, supra.*

[46] *Id.*

[47] 33 U.S.C. § 905(a).

[48] *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983); *Reed v. S.S. YAKA, supra. See also, Guilles v. Sea-Land Service, Inc.,* 12 F.3d 381 (2d Cir. 1993); *Smith v. Eastern Seaboard Pile Driving, Inc.,* 604 F.2d 689, 795 (2d Cir. 1979).

'refinement' of the term 'seaman' in the Jones Act."[49] Thus, as *Gizoni* patiently explains, while employers and their carriers have an obvious interest in forcing injured waterfront workers to queue up behind one statute or the other, "the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA."[50] In sum, HTB and its *amici* shook hands with a tar baby when they embraced *Sharp v. Johnson Bros. Corp.*,[51] and suggested that *any* award of LHWCA benefits automatically bars a subsequent Jones Act claim.

2. The Sweeping Conclusion in *Sharp v. Johnson Bros. Corp.*, that Any LHWCA Award Automatically Bars a Subsequent Jones Act Claim, Does Not Deserve the Supreme Court's Imprimatur.

The *Sharp* case essentially held that an LHWCA "settlement constituted an election of remedies and precluded the filing of a suit based upon general maritime law or the Jones Act"[52] even though "LHWCA coverage was never litigated in an adversarial proceeding."[53] Noting that such settlements must be approved by the

[49] *Gizoni, supra*, 502 U.S. at 87.

[50] *Id.* at 91-92 *citing* 33 U.S.C. § 903(e).

[51] *Supra.*

[52] *Id.*, 973 F.2d at 425.

[53] *Id.* at 426.

Department of Labor pursuant to 33 U.S.C. § 908(i) of the Act,[54] the Fifth Circuit concluded that the vessel-based harbor worker in that case had somehow forsaken his rights as a seaman simply by availing himself of the LHWCA's "statutory machinery to bargain for an [interim] award."[55] This result created bad law for several reasons.

For starters, this was the second time that the Fifth Circuit had entertained this case on appeal,[56] and it was sufficiently "distressed" over the attorneys' failure to disclose their LHWCA settlement during the first proceeding to admonish them, right in the published opinion, that "candor and respect for this court would dictate that the parties inform us of so significant a development in their litigation."[57] Given the harshness of their ultimate ruling, we can't help but wonder whether that distress spilled over into the Court of Appeal's reasoning. That reasoning is otherwise very hard to explain.

For example, *Sharp* paid nothing but lip service to the older Fifth Circuit cases on point, like *Simms v. Valley Line Co.*[58] and *Boatel, Inc. v. Delamore* (which specifically ruled against "a finding of collateral estoppel", in a situation very similar to the one in *Sharp*, because "the issue of whether the Longshoremen's Act properly covered this employee was not raised by the parties nor was evidence

[54] 33 U.S.C. § 908(i).

[55] *Sharp, supra.*

[56] *See Sharp v. Johnson Bros. Corp.*, 917 F.2d 885 (5th Cir. 1990).

[57] *Sharp ("II"), supra*, 973 F.2d at 427 fn. 3.

[58] *Supra.*

taken on this subject, though it was in the mind of the Deputy Commissioner since he had informally discussed it with claimant a month prior to the hearing but did not pursue the matter because neither party had raised the issue.")[59] More importantly though the opinion was couched in terms of "collateral estoppel", and spoke of the settlement decree as a "formal award", it is actually anchored in the rocky ground of election. As *Sharp* summed up:

> "Congress did not intend that the worker be able to pick and choose his remedy based upon which has conferred upon him a larger award. That is, the LHWCA was not intended to be a 'stepping stone on the way to a jury award.' *Fontenot*, 923 F.2d at 1133."[60]

In point of fact, Congress did not intend that the worker be put to any elections.

"Broadly, an election of remedies is the act of choosing between two or more different and coexisting methods of procedure and relief allowed by law on the same set of facts."[61] It's equitable in nature, and constitutes a procedural or administrative doctrine, not a rule of substantive law.[62] But as LHWCA opinions from every level of decision have confirmed, "in the absence of express legislative declaration to the contrary, the courts

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[59] *Supra*, 379 F.2d at 854.

[60] *Sharp, supra*, 973 at 426.

[61] "Election of Remedies" §§ 1-3, 25 Am Jur 2d. 761-762 (1996).

[62] *Id.*

have been reluctant to extend this relatively harsh doctrine."[63] There are no such declarations in the LHWCA. To the contrary, as originally drafted back in 1927, the Act required longshoremen and harbor workers "to choose between the receipt of a compensation award from [their] employer and a damage suit against the third party. Act of Mar. 4, 1927, § 33, 44 Stat. 1440."[64] But as this Court has repeatedly noted:

> "In 1959, Congress amended the Act to delete the election-of-remedies requirement altogether. Act of Aug. 18, 1959, 73 Stat. 391. Existing law was felt to 'wor[k] a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party.' S.Rep.No. 428, 86th Cong., 1st Sess., 2 (1959), U.S. Code of Cong. & Admin.News, p. 2134. The result was that an injured employee 'usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit.' *Id.*, U.S. Code Cong. & Admin.News, p. 2134."[65]

Almost fifty years later, the same may be said of John Papai, Ernest Sharp, or any other vessel-based harbor worker who "elects" to take an interim compensation settlement while he and his family are waiting for their Jones Act case to come to trial. The *Sharp* opinion ignores

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[63] *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 583 F.2d 1273, 1277 (4th Cir. 1978).

[64] *Bloomer v. Liberty Mutu. Ins. Co.*, 445 U.S. 74, 79 (1980).

[65] *Id.* at 80 [other citations omitted]. *See also, Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 535-537 (1983).

this blunt reality. As this Court observed in *Gizoni*, "We find no indication in the LHWCA that Congress intended to preclude or stay traditional Jones Act suits in district courts."[66] In sum, the *Sharp* opinion erred when it read the LHWCA to comprise an implicit election. That opinion does not deserve a Supreme Court imprimatur.

3. Nor Should a Fully Litigated LHWCA Award Necessarily Collaterally Estop Vessel-Based Harbor Workers Like John Papai from Pursuing their Jones Act Rights.

It is clear, then "that compensation statutes are not intended to deprive a seaman or his [or her] replacement of his [or her] historic rights."[67] Once we've steered past *Sharp* and the doctrine of elections, we're back in district court where the "[r]ules of civil pleading allow alternative claims by the use of distinction and alternative counts, *n'importe* their inconsistency."[68] As we've already seen, there is nothing "sinister" or inequitable[69] about prosecuting inconsistent claims under the LHWCA and the Jones Act provided the plaintiff advises both the Department of Labor and the employer that he or she intends to pursue alternative counts, so that "applicant and counsel would have been altogether candid with the agency, and the employer would be protected from

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[66] *Gizoni, supra*, 502 U.S. at 90.

[67] *Biggs, supra*, 360 F.2d at 364.

[68] *Id.*

[69] *See Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 145 (2nd Cir. 1963).

duplication of payment by being advised through notice to withhold the sums paid by any judgment."[70]

"When the compensation process has gone beyond acceptance of benefits and even beyond the filing of a claim to the point at which a formal award has been entered," however, "a far more formidable defense looms, that of *res judicata* or collateral estoppel."[71] Though *Wilander* instructs that the findings of the Department of Labor are conclusive[72], even today "the extent to which collateral estoppel and *res judicata* will be applied to a Jones Act suit following a formal Board finding of non-seaman status and an award of benefits appears to be a matter of first impression [before this Court] (and one about which the commentators suggest there is uncertainty)."[73] As Gilmore and Black summed up:

> "Even the payment of benefits pursuant to a formal award in a contested proceeding is not necessarily fatal to the Jones Act action. The courts have shown themselves receptive to the argument that the compensation award may have been made without a proper adjudication of the claimant's status as harbor worker or seaman. But the plaintiff who attempts to bring a Jones Act action following a compensation

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[70] *Biggs, supra*, 360 F.2d at 365-366.

[71] 4 Larson, *Workmen's Compensation Law*, § 90.51, pp. 16-357 to 16-367 (1983).

[72] *Wilander, supra*, 111 S.Ct. at 818.

[73] *Simms, supra*, 709 F.2d at 412.

> award in a contested proceeding may find himself barred in a court which takes *res judicata* and collateral estoppel seriously."[74]

The question at bar, of course, is how seriously *this* Court intends to take *res judicata* and collateral estoppel when it comes to administrative judgments like the one received by John Papai.

As Your Honors already explained in *U.S. v. Utah Construction & Mining Co.*:

> "Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."[75]

Under the *Utah Construction* test, if it appears from the record that the administrative tribunal in question, (1) had jurisdiction over the case, (2) "was acting in a judicial capacity," and (3) resolved factual disputes that "were clearly relevant to issues properly before it," this Court has traditionally given its determinations collateral effect *so long as* "both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings."[76]

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[74] Gilmore & Black, *supra*, at 435.

[75] 384 U.S. 394, 421-422 (1966).

[76] *Id.* at 422.

The UBCJA does not dispute that the administrative law judge in this case had jurisdiction over Papai's LHWCA claims, or that he was acting in a judicial capacity. The LHWCA and Department of Labor regulations, after all, have vested the Office of Federal Administrative Law Judges with adjudicative jurisdiction over all longshore claims,[77] and 33 U.S.C. § 919(c) of the statute expressly incorporates the "trial-like" procedures spelled out in the Administrative Procedures Act.[78] We do, however, query whether "both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse rulings."

Eschewing the rule in *Sharp*, and noting that "[c]ollateral estoppel bars a party from relitigating an issue if (1) the issue at stake is identical to the one alleged in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action," the Ninth Circuit refused to bar a vessel-based harbor worker from prosecuting his Jones Act rights in *Figueroa v. Campbell Industries*, even though he'd already received a formal award under the LHWCA, because the administrative "record does not reflect an express finding by anyone that Mr. Figueroa was not a 'master or member of a crew' for purposes of the LHWCA."[79] The assertion that the claimant was a "master or a member of a crew", after all, is an affirmative defense which will be waived unless it's

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[77] 33 U.S.C. § 919(a); 20 CFR §§ 702.301 *et seq.*

[78] 5 U.S.C. §§ 500 *et seq.*

[79] 45 F.3d 311, 315 (9th Cir. 1995).

raised by the employer or its LHWCA carrier.[80] As *Figueroa* explains, "Courts that have addressed the precise issue of whether the jurisdictional issue must be actually litigated for estoppel to apply in this situation have found that if the jurisdictional issue was not contested and no finding was made at the administrative level, a plaintiff is not estopped from bringing a Jones Act claim."[81] It follows that an employer like HTB cannot rely on administrative collateral estoppel to bar a subsequent Jones Act claim *unless* it has specifically alleged, litigated and *lost* the crew member issue in the LHWCA proceeding. This, of course, not only begs the confounding tactical, equitable and even ethical considerations that populate the "through-the-looking-glass" situation where an employer's Jones Act carrier wants its insured to "lose" the LHWCA case while the LHWCA carrier wants to win it;[82] it brings us directly to the central question of this appeal. Can we conscientiously conclude that both parties to an LHWCA claim "had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse rulings" where, as here, neither party really wants to "win"? The UBCJA respectfully submits that the answer to that question can only be "No."

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[80] *Lazzari v. Matson Navigation Co.*, 29 Ben.Rev.Bd.Serv. 521 (ALJ), 524(ALJ) (1995).

[81] *Id. citing Guidry v. Ocean Drilling & Exploration Co.*, 244 F.Supp. 691 (W.D.La. 1965).

[82] Note, "Looking For A Lodestar Among the Rocks and Shoals of Longshore Coverage" 3 U.S.F.Mar.L.J. 227, 261-262 (Sum. 1991).

That, of course, is why the Ninth Circuit held, in this case that "the plaintiff's litigation of his LHWCA claim does not bar his subsequent Jones Act claim" even though the ALJ had denied the employer's half-hearted "crew member" defense.[83] Indeed, when we reflect that the district court had summarily (albeit erroneously) dismissed Mr. Papai's Jones Act claims *before* the LHWCA case was even called to trial, we begin to appreciate how confounding the petitioner's arguments really are. It is obvious, for example, that after the Jones Act carrier had already established that Papai was a longshore harbor worker before the federal district court, the employer's LHWCA attorney was equitably estopped from arguing otherwise before the federal administrative law judge.[84] It is equally obvious that, if he had himself heeded the tenets of collateral estoppel, the federal administrative law judge would have never re-litigated Mr. Papai's crew member status in the wake of the district court's ruling. Though the ALJ reportedly declined to do so because the district court's ruling was either interlocutory or still on appeal, "The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as *res judicata* or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding *de novo*."[85] In short, far from

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[83] *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 208 (9th Cir. 1995).

[84] *Roth v. McAllister Bros., Inc., supra*, 316 F.2d at 146.

[85] 1B *Moore's Federal Practice* (2d ed.) ¶ 0.416[3], pp. 521-522. *See also, Hunt v. Liberty Lobby*, 707 F.2d 1493, 1497 (D.C.Cir. 1983).

foreclosing Mr. Papai's subsequent Jones Act claims through administrative estoppel, the LHWCA tribunal should have never even considered the "crew member" issue.

At all events, the schizophrenic positions assumed by the employer and its lawyers clearly supports the Ninth Circuit's view that "a bar to relitigation would not serve the purpose for which it is usually employed since the parties are forced to take inconsistent positions under the Jones Act and the LHWCA".[86] That view seems more appropriate still when we consider Mr. Papai's plight. After the district court had dismissed his Jones Act claims under Rule 56,[87] this disabled worker likewise lost his interim claim for maintenance. It does not overstate matters too much to suggest that this left him crucified on the horns of a painful dilemma. He could either tighten his belt and forego his interim claims for LHWCA benefits in the hope that, one day, his Jones Act rights would be vindicated, or he could risk losing those rights forever by prosecuting a claim for provisional relief under the LHWCA. Were the doctrine of collateral estoppel as implacable as HTB and its *amici* seem to think, the admiralty courts would have to officiate, like Pilate, as injured workers were condemned by a curious "Catch-22." Without belaboring the matter, "the employer who immediately and voluntarily begins compensation payments would be subject to suit [while] the employer who forces his employee to seek compensation would be

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[86] *Papai, supra*, 67 F.3d at 208.

[87] 28 U.S.C., Fed.R.Civ.Pro. 56.

immune from suit."[88] Given the "peculiar rights, privileges, duties and liabilities" that crowd this corner of the law, and the fact that it's inhabited by the particular "wards of admiralty"[89] (an endangered species if there ever was one), we respectfully submit that the requirements of administrative estoppel could not possibly be that perverse or intractable. In sum, the UBCJA contends that even a fully litigated LHWCA award should not necessarily estop vessel-based workers like John Papai from pursuing their Jones Act rights.

4. The Requirements of "Mutual Exclusivity" Are Met by the Credit Mechanisms Built into Each Statute.

In the end, careful consideration of the problem confirms that Congress did not make the LHWCA and the Jones Act mutually exclusive just to snare all the harbor workers who are injured in the "zone of uncertainty" with elections or estoppels. As the set off provisions in § 903(e) clearly demonstrate, it made them mutually exclusive to prohibit double recovery. Under those provisions, any amounts paid to an injured waterfront worker pursuant to "46 U.S.C. § 688 (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this Act."[90] While the Jones Act does not expressly contain a corresponding offset, it was passed several years before the LHWCA and is, in any

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[88] *Biggs, supra*, 360 F.2d at 364.

[89] *Chandris, supra*, 115 S.Ct. at 2195 [Stevens J. concurring].

[90] 33 U.S.C. § 903(e). *See also, Gizoni, supra*, 502 U.S. at 91-92.

event, "a statute of the most general terms".[91] Congress therefore left the duty of finishing and fashioning the seaman's Act largely to the courts.[92] Since most courts agree "[t]he order of asking for relief should not be decisive"[93] it is now well-settled that:

> "If the plaintiff succeeds in [his subsequent Jones Act] suit, the employer may recoup the amounts already paid by deducting them when satisfying the judgment. In the event the compensation was paid by one insurer and the judgment becomes payable by another, the employer as the legal debtor in both instances may retain from the settlement of the judgment the sums necessary to reimburse the compensation carrier. The two remedies – compensation and suit – are thus made complementary. An important purpose of the compensation statutes, to provide immediate relief to an injured employee, is achieved and the injured party's opportunity to press further remedies remains unabridged."[94]

HTB and its *amici* argue that these offsets are imperfect, and that the employer can never really recoup all of its payments. Our learned friends from the Matson Navigation Co. and the Industrial Indemnity Company even suggest that, judging from the ratio of benefits to total costs, workers' compensation remedies like the LHWCA are "74.8%" efficient while tort remedies like the Jones Act are only "43%" efficient.[95] While these arguments and

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[91] *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1957).

[92] *Id.*

[93] *Biggs, supra*, 360 F.2d at 364.

[94] *Id.*

[95] *Brief of Industrial Indemnity Company et al., p.* 13.

statistics show that no benefit system can stop all the fiscal leaks, they do *not* alter this Court's foregone conclusion that, porus or not, the statutes' inter-connecting credit mechanism "removes the threat of double recovery," and thus remains the only practical bulwark of mutual exclusivity.[96] In other words, in the complex and imperfect world of maritime personal injury law, so long as vessel-based harbor workers like John Papai are obligated to give vessel-owning employers like HTB an offset for the interim LHWCA benefits they've already received, there are no compelling equitable, doctrinal or collateral reasons for estopping their Jones Act claims.

II.

THE "FACT SPECIFIC" INQUIRY INTO A CAUSAL WORKER'S SEAMAN STATUS SHOULD NOT BE CONFINED TO THAT HAND'S ASSIGNMENT AT THE MOMENT OF THE ACCIDENT, BUT SHOULD CONSIDER HIS OR HER OVERALL UNION WORK HISTORY.

Seaman's status, of course, is "a mixed question of law and fact."[97] While attempts to fix "a firm legal significance to such terms as 'seaman', 'vessel', [and] 'member of a crew' " almost invariably come to grief on the facts,[98] after decades of confusion this Court has recently made it

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[96] *Gizoni, supra*, 502 U.S. at 92, fn. 5.

[97] *Wilander, supra*, 498 U.S. at 356.

[98] *Estate of Wenzel v. Seaward Marine, Inc.*, 709 F.2d 1326, 1328 (9th Cir. 1983).

clear that "[t]he key to seaman status"[99] is an employment-related "connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."[100] Admitting that Papai was a Z-card-carrying merchant mariner, that he was a member of the Inland Boatman's Union and that he had received day-to-day, or "casual", union dispatches to a fleet of different tugs, ferries and other vessels, HTB argues that our respondent was not a Jones Act seaman because that fleet was not "under common ownership or control."[101] To put is as politely as possible, this argument takes the so-called "fleet seaman doctrine," and turns it on its head.

Under the "fleet seaman doctrine", an injured worker's "status as a crewmember is determined 'in the context of his entire employment' with his current employer."[102] The doctrine was originally devised by the Fifth Circuit, in a case involving an "ambiguous-amphibious maritime worker",[103] "to ease the requirement that, to be a seaman, the claimant had to be 'assigned permanently to a vessel.' "[104] While it has been applied

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[99] *Id.* at 498.

[100] *Chandris, supra,* 115 S.Ct. at 2190.

[101] *Petitioner's Brief, pp.* 32-39.

[102] *Barrett v. Chevron, U.S.A., Inc.,* 871 F.2d 1076, 1074 (5th Cir. 1986).

[103] *Braniff v. Jackson Ave-Gretna Ferry, Inc.,* 280 F.2d 523, 525 (5th Cir. 1960).

[104] *Stanfield v. Shellmaker, Inc.,* 869 F.2d 521, 525 (9th Cir. 1989) *quoting Braniff, supra,* 280 F.2d at 526.

to such lubberly plaintiffs as tool pushers[105], drilling foremen[106], derrick operators[107], riggers[108], sandblasters[109], mechanics[110], and even granary workers,[111] until recently it had never been used to deny seaman status to a classic merchant mariner. As the Fifth Circuit pointed out in its lodestar *Barrett* opinion: "We do not decide whether the same principle governs the crewmember status of the maritime worker who spends virtually all of his time performing traditional seaman's duties [like John Papai] but does his work on short voyages aboard a large number of vessels."[112] Unfortunately, despite this sunny beginning, the "fleet seaman doctrine" underwent a mysterious sea change during the 90's.

For example, in 1991, despite a scathing dissent from one of its leading jurists, the Fifth Circuit concluded that ship's pilots are not seaman because the vessels they steer in an out of port do not comprise an "identifiable fleet"

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[105] *Guidry v. Continental Oil Co.,* 640 F.2d 523 (5th Cir. 1981).

[106] *Higginbotham v. Mobil Oil Corp.,* 545 F.2d 422 (5th Cir. 1977).

[107] *Liverette v. N.L. Sperry Sun, Inc.,* 831 F.2d 554 (5th Cir. 1987).

[108] *Chauving v. Sanford Offshore Salvage, Inc.,* 868 F.2d 735 (5th Cir. 1989).

[109] *New v. Associated Painting Services, Inc.,* 863 F.2d 1205 (5th Cir. 1989).

[110] *Braniff, supra.*

[111] *Jones v. Mississippi River Grain Elevator Co.,* 703 F.2d 108 (5th Cir. 1983), *cert. den.,* 464 U.S. 856 (1983).

[112] *Barrett v. Chevron USA, Inc., supra,* 781 F.2d at 1075, fn. 13.

operating under uniform ownership or control.[113] Courts from the Fifth Circuit have since concluded that, even when they plumb the depths for a single employer, deep sea divers – seafarers whose "work necessarily involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land"[114] – lack an employment-related connection to an identifiable fleet when the vessels from which they dive are owned by different companies.[115] The UBCJA respectfully submits that the Ninth Circuit was correct when it refused to read the fleet seaman doctrine so narrowly.[116]

HTB, and the cases on which it relies, have taken the fleet seaman doctrine, and Jones Act law in general, way off course. Deep sea divers, after all, have enjoyed the rights and duties of seamen since 1859.[117] Ship's pilots

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[113] *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 328 (5th Cir. 1991) [Brown J. dissenting] *vacated*, 114 L.Ed.2d 706 (1991) *reinstated on reconsideration*, 947 F.2d 129 (5th Cir. 1991) *cert. den.*, 118 L.Ed.2d 592 (1992). *See also, Harwood v. Partredereit AF*, 944 F.2d 1187, 1194 (4th Cir. 1991) [Ervin C.J. dissenting] *cert. den.* 118 L.Ed.2d 493 (1982). *See also, Evans v. United Arab Shipping Co., S.A.G.*, 4 F.3d 207 (3d Cir. 1993). *Contra see, Ringering v. Compania Maritima De-La Mancha*, 670 F.Supp. 301 (D. Or. 1987) *aff'd mem.*, 848 F.2d 1243 (9th Cir. 1988); *Clark v. Solomon Nav. Co., Ltd.*, 631 F.Supp. 1273 (S.D.N.Y. 1986).

[114] *Wallace v. Oceaneering Int'l, supra*, 727 F.2d at 436.

[115] *Ashley v. Epic Divers, Inc.*, 818 F.Supp. 172 (E.D.La. 1991); *Gates v. Delta Corrosion Offshore, Inc.*, 715 F.Supp. 160 (W.D.La. 1989). *But see, Hall v. Professional Divers of New Orleans*, 865 F.Supp. 363 (E.D.La. 1994).

[116] *Papai, supra*, 67 F.3d at 206 fn. 3.

[117] *See, e.g., The Highlander*, 12 Fed.Cas. 136 (D. 1859) [salvage diver]; *The Murphy Tugs*, 28 F. 429 (E.D. Mich., 1886) [salvage diver]. *See also, Wallace v. Oceaneering Int'l, supra* [oilfield diver]; *Pickle v. Int'l Oilfield*, 791 F.2d 1237 (5th Cir. 1986) [oilfield diver]; *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372 (5th Cir. 1981).

have been deemed seamen from the earliest days of the Republic.[118] If the Jones Act was truly designed to " 'offset the special hazards and disadvantages to which they who go down to the sea in ships are subjected' ",[119] it is virtually impossible to imagine anyone who deserves its protection more than deep sea divers and ship's pilots. In the end, the same may be said of Inland Boatman Union members like John Papai.

Lest casual mariners like Mr. Papai ultimately find themselves marooned by a doctrine that was originally designed for oil field hands and granary workers, the UBCJA respectfully urges the Court to consider the Second Circuit's decision in *Fisher v. Nichols*,[120] The plaintiff in that case, like the respondent in this one, was a career mariner who had worked aboard the vessel that disabled him "for only one day."[121] He was, in fact, a professional yacht racer who sailed for a host of different owners. Concluding that his " 'entire career up to and including the moment he suffered the injury was dedicated to sea-based work' ", the Second Circuit declined "to adhere slavishly to the 'fleet doctrine' found in the case law of some of our sister circuits."[122] Rules *Fisher*:

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[118] *See e.g., Wilander, supra*, 498 U.S. at 344.

[119] *Chandris, supra*, 115 S.Ct. at 2191.

[120] 81 F.3d 319 (2d Cir. 1996).

[121] *Id.* at 323.

[122] *Id.*